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# 100 YEARS OF CONFLICT: THE PAST AND FUTURE OF TORT RETRENCHMENT

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## I. INTRODUCTION

In the 1970s insurance companies, tobacco interests, and large industry launched a political campaign attacking the American civil justice system.<sup>1</sup> Unlike previous reform efforts that sought to change rules of law through case-by-case adjudication in the courts, the self-styled tort “reform” movement pursued a much grander vision: transforming the cultural understanding of civil litigation, and especially personal injury lawsuits, by attacking the system itself. Success would be measured not by remaking formal rules of law through conventional litigation or even legislation but by changes to the public perception of how the civil justice system operates.

“Tort reform”—or “retrenchment”—advocates seek to persuade the public through advertising and lobbying that the civil justice system is corrupted; that its operations constrict the economy; that lawyers foment excessive litigation; that juries and judges systematically tilt towards sympathetic individual plaintiffs and against businesses in awarding large money judgments. The result? Astronomical liability insurance premiums and businesses reluctant

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1. See, e.g., THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 23–24 (2002); Stephen Daniels & Joanne Martin, *The Impact That It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 453 (2000).

to take risk. The unique contribution of the tort retrenchment movement is a judgment that earlier losses over the content of tort law could be reconfigured and refought in a new arena, the court of public opinion. Marrying political savvy honed over decades of legislative lobbying to marketing skills developed in the context of retail sales of goods and services, proponents of tort reform made the strategic choice to politicize the content of tort rules in a very public effort to undermine the civil justice system.

The decision to engage the public and politicians in explicit discussions about the content of legal rules, however, did not directly reengage the battles that had been lost in decades of legal decision making by courts in a wide variety of contexts. Instead, the goal was to bring a frontal assault on the system itself.<sup>2</sup> Before the tort reform movement galvanized conservative politicians in the 1970s and 1980s, most nonlawyers had no idea what a "tort" was. By the 1990s, however, the Republican Vice President of the United States could give speeches proclaiming that the tort system was broken, and that his party was prepared to fix it.<sup>3</sup> The 1994 Republican "Contract with America" promised Americans that, if Republicans took control of Congress, one of ten key agenda items would be changing the civil justice system.<sup>4</sup>

This Article holds that tort retrenchment represents one manifestation of business and industrial reaction to social, political, and economic forces that transformed the American civil justice system during the first three quarters of the twentieth century. The tort retrenchment movement is reacting to key losses suffered in battles over the content of tort law during the last century. As an organized political force, the movement is merely part of the ebb and flow of the political forces that have shaped American tort law

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2. See Daniels & Martin, *supra* note 1, at 466–70 (discussing public relations campaigns in the 1970s–1980s designed to launch attacks on the civil litigation system).

3. Vice President Dan Quayle, Remarks at the Meeting of the American Bar Association, Atlanta, Georgia (Aug. 13, 1991) (transcript available through the Office of the President), [http://www.vicepresidentdanquayle.com/speeches\\_StandingFirm\\_ABA\\_1.html](http://www.vicepresidentdanquayle.com/speeches_StandingFirm_ABA_1.html).

4. See "Common Sense" Legislation: *The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1769 (1996) [hereinafter *Common Sense*]; see also *infra* Part II.

during the last century. Our thesis is that contemporary political battles over tort law are best understood if situated against the backdrop of those earlier battles over the content of tort law. We also suggest that those who wish to defend the civil justice system against retrenchment should explicitly address how the legal system changed from 1900 to 1980 to grant far more protections to citizens.

In order to understand the movement for "reform" of the civil justice system, therefore, it will be useful to situate the politics of tort reform within a broader context. For example, one can trace the movement for caps on damages to the decades-long battle over recognizing psychic harm as worthy of compensation within the civil justice system.<sup>5</sup> One can trace the medical community's antipathy towards trial lawyers to developments within tort law that abandoned the locality rule of practice—that effectively undermined the "conspiracy of silence" and enabled incompetent physicians to continue practicing—and in effect held doctors to a national standard of care.<sup>6</sup>

Moreover, one can trace increased business insurance rates not only to statutory torts banning employment discrimination such as sex harassment but also to the removal of immunities that barred worthy suits against wrongdoing by charities and governmental agencies at the courthouse doors.<sup>7</sup> For example, the current crop of lawsuits against the Catholic Church for sheltering known child molesters would not have been possible under the earlier regime. Finally, contemporary battles over "joint and several liability" can be linked to the losing wars industry groups fought to limit their exposure to Superfund liability under the Comprehensive

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5. See *infra* Part III.D.

6. See *infra* Part III.B.2.

7. See generally Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 402–05 (1991) (discussing the deleterious effect that abolition of the charitable immunity doctrine had on insurance premiums for organizations staffed with volunteers); Jeffrey D. Kahn, Comment, *Organizations' Liability for Torts of Volunteers*, 133 U. PA. L. REV. 1433, 1436–47 (1985) (describing the trend toward abolishing the charitable immunity doctrine and the increased tendency of the insurance industry to deny coverage to charitable organizations or impose high premiums upon them); Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R.4th 517 (1983) (describing the history and abrogation of the charitable immunity doctrine).

Environmental Response, Compensation, and Liability Act (CERCLA),<sup>8</sup> and to major class actions remedying massive damages created by asbestos, toxic torts, and consumer products such as IUDs and Bendectin.<sup>9</sup>

So situated, then, the contemporary political battles over tort reform can be explicitly linked to the politics of an earlier era that at one time was confined to debates in the courtroom. By bringing debates over substantive law into the political arena, tort reformers have made explicit what was once implicit: competing forces that marshal arguments from political, economic, moral, and social theory shape the content of tort rules. Tort reformers endorse what an earlier generation of progressive reformers, the legal realists, asserted: tort law results from the competition among different political interests to establish the background operating rules within the society that allocate power and distribute losses among those interest groups.<sup>10</sup> The rules of tort are so important, in other words,

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8. 42 U.S.C. §§ 9601–9675 (2000). Section 9607 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, imposes joint and several liability on four categories of responsible parties for cleaning up contamination caused by hazardous substances. *Id.* § 9607. Congress enacted CERCLA on December 11, 1980. Environmental Protection Agency, *CERCLA Overview*, at <http://www.epa.gov/superfund/action/law/cercla.htm> (last visited Aug. 1, 2005). CERCLA taxed the chemical and petroleum industries. *Id.* It also granted federal authority to respond directly to releases, or threatened releases, of hazardous substances at risk of endangering the public's health or the environment. *Id.*

9. See *infra* Part III.A.1–5.

10. See generally K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 111–14 (1951) (discussing the role of law in organized civilization); Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 583–85 (1933) (discussing the role of contract theory in enabling courts to distribute gains and losses among parties); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976) (exploring the connection “between the ‘erosion of the rigid rules of the late nineteenth century theory of contractual obligation’ and the ‘socialization of our theory of contract . . .’”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 169–246 (1992) (exploring the theories underpinning legal realism and its impact on modern legal thought); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*) (discussing legal realism as a critique of social power and as a justification for law's role in undermining theories of self-regulation)); Robert

that what may appear to represent esoteric, interstitial rules or gap-filling concepts instead themselves structure social and economic power and thus entail significant distributional consequences. Thus, the politics of contemporary tort reform replicates the politics of the earlier battles, but in a different forum and employing a vastly different rhetoric.

Our discussion of these ideas is broken into three parts. First, we will give a brief history of the contemporary tort reform movement, the political movement of the last thirty years led by insurance and industry interests to transform the American civil justice system.

Second, we will outline some of the key developments within the civil justice system that took place over the first decades of the twentieth century, and against which the contemporary tort reform movement is reacting. This discussion comes with some caveats: tort reformers might not want to associate proposed reform of the civil justice system with other reactive proposals to roll back major civil law developments, such as civil rights laws banning sex harassment, the reinstatement of immunities protecting vicious husbands and negligent charities from suit, and the total bar of contributory negligence. Not all tort reformers wish to reestablish those immunities permitting husbands to beat their wives with impunity, or hospitals or schools to injure patients or students seriously with no possibility of redress. One of the theses of this paper, however, is that the retrenchment movements are linked to each other both politically and philosophically. In turn, the arguments that resulted in increased protections given to women,

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L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (explaining the law's role in equalizing relations between parties of otherwise unequal bargaining power); Robert L. Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196 (1946) (explaining tort law's role in imposing obligations on parties to behave in ways that would sometimes not be the result of free bargaining will); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 838-42 (1935) (discussing the role that legal concepts should play in guiding realistic judges to weigh the conflicting human values presented in every case); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (advocating that law should play a more prominent role in allocating power between individuals and behemoth economic interests).

children, workers, patients, and those injured by faulty products or concealed toxic dumps are linked as well.

In the final section of the paper, we will sketch some of the key challenges that face both tort reformers and defenders of the civil justice system. Those who wish to defend the civil justice system from the political challenges posed by tort retrenchment, we argue, will be best served if they explicitly connect the current politics of tort reform to those earlier (and successful) legal battles that shaped the content of those tort rules now under political challenge.

## II. A BRIEF HISTORY OF "TORT REFORM"

Tort law has been described as "a battleground of social theory."<sup>11</sup> History reveals this statement's truth as social values continue to influence the creation of new tort duties and the reinforcement of existing duties. Tort reform, in the sense of the word that refers to "progress, improvement, and the correction of abuse or imperfection,"<sup>12</sup> actually has its roots in the Progressive Era of legal scholarship following World War I, during which time criticism was leveled at the tort system's deficiency in adequately compensating injured plaintiffs.<sup>13</sup> Prior to that time, substantial barriers blocked access to the legal system, such as tort laws creating substantial defenses for employers in response to claims by injured workers, and a legal maze that made claims virtually impossible for people with limited financial resources.<sup>14</sup> Contributory negligence, the fellow servant rule, and assumption of risk are just a few examples of doctrines that weighed against injured plaintiffs seeking redress.<sup>15</sup> At that time, ostensibly "frivolous lawsuits" did not appear

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11. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 3, at 14 (3d ed. 1964).

12. Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 651 n.10 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)) (noting the "uncomfortable position" in which opponents of tort reform find themselves, given the traditional meaning attributed to "reform." Reform organizations, such as the American Tort Reform Association, "have made full use of the term" to characterize their desired "pro-defendant tort-rule modifications").

13. See, e.g., *Common Sense Legislation*, *supra* note 4, at 1766.

14. See Page, *supra* note 12, at 656.

15. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 470-75 (2d ed. 1985).

on the radar of critics, since much of the existing common law was pro-defendant and mechanisms to screen out meritless suits were available.<sup>16</sup> Remnants of the Progressive Era include broader application of strict liability principles,<sup>17</sup> as well as the doctrine of joint and several liability,<sup>18</sup> and the legislatively enacted workers' compensation system.<sup>19</sup>

Tort rights expanded in the post-World War II era, particularly during the period 1960-1980, in part due to the elimination of defendant-friendly immunities and defenses, the adoption of strict liability, and an "emerging concern about toxic exposures and a broader-based rise in claims consciousness on the part of the public."<sup>20</sup> This period, lasting roughly from 1945-1980, has been described as the "Democratic Expansionary Era" in which plaintiff-friendly tort expansion occurred following two centuries of law favorable to society's wealthy and educated elite.<sup>21</sup> Judicially

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16. See *Common Sense*, *supra* note 4, at 1779. But see Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720 (1981) (offering the opposing view that early tort law "exhibited a keen concern for victim welfare").

17. See *Common Sense*, *supra* note 4, at 1766-67.

18. See John W. Wade, *Should Joint and Several Liability of Multiple Tort Feasors Be Abolished*, 10 AM. J. TRIAL ADVOC. 193, 193-97 (1986).

19. See generally 1 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION § 2.07-08 (2001) (chronicling the history of workers' compensation law in the United States. By 1920 all but eight states had adopted workers' compensation statutes, with Hawaii being the last state to create a system in 1963. *Id.* § 2.08); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797-803 (describing the features of the English Workmen's Compensation Act of 1897, which served as a model for statutes in the United States). Admittedly, some pro-plaintiff strides were made around the time of World War I. For instance, Judge Cardozo permitted a plaintiff to recover from the manufacturer of a defective wheel that collapsed while driving, even though the plaintiff was not in privity with the negligent manufacturer, since the resulting danger was foreseeable. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051-55 (N.Y. 1916).

20. Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 537 (2001) (quoting Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 853 (1992)).

21. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 38 (2002).



recognized special relationships, gender-based torts, the abolition of contributory negligence and adoption of comparative negligence statutes, a strict rule for injuries resulting from defective, unreasonably dangerous products,<sup>22</sup> and premises liability<sup>23</sup> all paved the way for a tort liability system allocating a greater share of accident losses to business and corporate interests.

Beginning in the 1960s, the tort system underwent dramatic upheaval, with judges recognizing new duties for landowners, physicians, and the general public.<sup>24</sup> Notably, courts abandoned privity of contract as a requirement for recovering under the theory of implied warranty of merchantability.<sup>25</sup> Judicial decisions influenced by the theory of enterprise liability might have also contributed to the increase in opportunities for injured plaintiffs to recover.<sup>26</sup> The gradual increase in pro-plaintiff rights through common law torts sprung not only from judicial action, but also in

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22. See Page, *supra* note 12, at 653 & n.22 (citing *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900-01 (1963) ("holding manufacturer of combination power tool strictly liable in tort for harm caused by defective product")).

23. See Rustad, *supra* note 20, at 536-37.

24. See generally Part III; see also Page, *supra* note 12, at 652 n.19 (referencing *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (landowners owed duty of reasonable care to all entrants, regardless of status); *Natanson v. Kline*, 350 P.2d 1093, 1106, *reh'g denied*, 354 P.2d 670, 672 (Kan. 1960) (physician owed duty to inform patient of material risks inherent in treatment or surgery); *Battalla v. State*, 176 N.E.2d 729, 731-32 (N.Y. 1961) (duty to refrain from negligently inflicting mental distress that results in physical harm even when no physical impact on plaintiff's body)).

25. See, e.g., Page, *supra* note 12, at 691-92 (discussing *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), in which the court allowed the wife of a purchaser of a car to recover from the auto's retailer and manufacturer for injuries sustained when the steering wheel failed, even though the wife was not in privity with either tortfeasor).

26. See *id.* at 663 & n.82. "The theory of enterprise liability postulates that [businesses providing goods and services] should bear the losses associated with [those products] without regard to negligence." *Id.* Essentially, enterprise liability proposes a social welfare mechanism that spreads losses according to the most efficient manner possible. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern American Tort Law*, 14 J. LEGAL STUD. 461, 517 (1985); see also Steven Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 706-12 (1993).

response to the arguments put forth by attorneys advocating for injured plaintiffs, who vigorously pointed to rules that were unfair, illogical, or inconsistent with goals of tort liability.<sup>27</sup>

Since the late 1960s, however, several waves of tort retrenchment have swept the nation's legal system, presumably reacting to what was perceived as an expansion of tort rights and a corresponding, though unwelcome, increase in liability.<sup>28</sup> Each wave has been marked by one or more private sector industries blaming common law tort liability and litigiousness for a crisis-level rise in insurance premiums and policy cancellations, as well as other financially deleterious occurrences.<sup>29</sup> While scholars and the courts were largely responsible for shaping prior changes to tort law, the movement self-described as tort reform was and remains "fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system."<sup>30</sup>

In the first wave of retrenchment, businesses sought changes in rules of law, but, as noted earlier, the general public, more so than courts, were the target of the efforts at persuasion. Since the 1970s, corporate interests employed public relations campaigns to establish a jaundiced view of the civil litigation system in order to change the perspectives of both policy makers and jury members.<sup>31</sup> Hence, as commentators have suggested:

More than just the formal legal changes it seeks, *tort reform* has always been about altering the cultural environment surrounding civil litigation—e.g., what is perceived as an injury; whether and whom to blame for an injury; what to do about it; and even how to respond to what others

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27. See Page, *supra* note 12, at 654. The growth of a trial attorneys' bar association placed pressure on the adoption of judicial doctrines more favorable to plaintiffs. *Id.*

28. *Common Sense*, *supra* note 4, at 1767.

29. See *id.* (discussing the medical industry crisis of the late 1960s, commonly attributed to a rise in negligence claims, a rise in liability premiums for manufacturers in the 1970s, and a widespread insurance crisis in the 1980s marked by financial losses and cancellation of policies previously issued to high-risk insureds). The most recent wave has persisted since the 1980s, and built considerable speed in the mid-1990s when reform efforts began resurfacing en masse. See BURKE, *supra* note 1, at 32.

30. Page, *supra* note 12, at 654.

31. Daniels & Martin, *supra* note 1, at 453.

(especially plaintiffs and their lawyers) do with regard to naming and blaming.<sup>32</sup>

These campaigns led to many legislative changes in most of the states during the 1970s. Fourteen states passed laws encouraging arbitration; twenty-nine created screening panels for lawsuits; twenty limited contingency fees; fourteen capped damages; and nineteen restricted the collateral source rule (which does not reduce a plaintiff's award by monies received from third parties).<sup>33</sup> Moreover, no fewer than forty-three states and two territories enacted legislation to modify common law standards by limiting malpractice liability for health care providers.<sup>34</sup> Lastly, a number of states adopted no-fault automobile insurance systems in the wake of the perceived premium crisis.<sup>35</sup>

In the mid-80s, a second wave of increased insurance premiums hit multiple sectors, including the automotive and health care industries.<sup>36</sup> In response, industry associations and corporate entities, primarily in the insurance arena, set out on an intense polling campaign to gage the consuming public's opinion on a range of issues related to the civil justice system.<sup>37</sup> Polls sponsored by organizations such as the Insurance Information Institute, the All-Industry Research Council, the American Council of Life Insurance, and Aetna Insurance Company helped generate rhetoric that continues to be used in retrenchment campaigns today.<sup>38</sup> The public's responses to the polls reflected a sense of an unfair civil system overwrought with frivolous suits and burdened by excessive costs.<sup>39</sup> In general, poll responses indicated that the public attributed problems with the system to moral failings such as greed and lack of personal responsibility and honesty.<sup>40</sup> The polls reflected the

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32. *Id.* at 453 (emphasis added).

33. *See* BURKE, *supra* note 1, at 31.

34. *Common Sense*, *supra* note 4, at 1768 (quoting Peter A. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice*, 35 SYRACUSE L. REV. 939, 943 (1984)).

35. *E.g.*, Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DETROIT C.L. MICH. ST. U. L. REV. 1207, 1216.

36. *See id.* at 1220.

37. *See* Daniels & Martin, *supra* note 1, at 462.

38. *See id.*

39. *See id.* at 462-64.

40. *Id.* at 464.

perception that unless the system was fixed, the public would end up paying the price for these problems.<sup>41</sup> Of course, the values seemingly violated by this civil justice system gone awry were “implicitly built into the polls through the questions asked.”<sup>42</sup>

As in the 1970s, state legislatures responded to a rapid rise in liability insurance rates by enacting measures that capped pain and suffering damages, limited punitive damages, restricted the collateral source rule, and modified or eliminated joint and several liability rules.<sup>43</sup> In 1986 alone, forty-one of forty-six state legislatures enacted some type of tort reform measure.<sup>44</sup> Melding fact with opinion in a manner to support pro-defendant reforms materialized in other ways during this time. For example, Peter Huber broadly criticized tort law in his 1988 book, *Liability: The Legal Revolution and Its Consequences*, in which he proposed a return to contract law as the predominant mechanism for individuals to retain their rights and exercise their duties.<sup>45</sup>

Moreover, Huber coined the term “tort tax,” a now oft-repeated pejorative used to describe the alleged increase built into the price of goods and services to reflect the risk of liability.<sup>46</sup> The 1980s also marked a turning point in the judicial arena as state court judges recoiled from attempts further to expand tort rights.<sup>47</sup> Moreover, in states where judges were elected rather than nominated, private entities expended considerable resources on swaying judges’ opinions to support a tort system favorable to their interests.<sup>48</sup>

Despite the array of activities carried out by business in the name of tort reform, the changes through the 1980s tended to be

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41. See *id.* at 463–64 (showing the results of 1986 and 1987 joint surveys by Harris and Associates, Aetna and Roper, and All-Industry Research Council).

42. *Id.* at 465.

43. See BURKE, *supra* note 1, at 32.

44. See *id.*

45. Page, *supra* note 12, at 659–61 (discussing HUBER, *supra* note 12). Huber’s book was met with praise by publications such as the *Wall Street Journal* and *Forbes* magazine, though Page points to more than a few factual and legal inconsistencies in the publication. *Id.* at 660 & n.68.

46. See *id.* at 663.

47. See Rustad & Koenig, *supra* note 21, at 53.

48. See *id.* at 54.

piecemeal.<sup>49</sup> The retrenchment movement's greatest impact has been on shaping public opinion in creating a sense of crisis and, sometimes irrational, fear of lawsuits, rather than changing the tort system through legislative and judicial action.<sup>50</sup> The majority of tort reform measures that have managed to succeed have occurred in state legislatures, whereas reforms at the federal level have—at least until 2005—encountered more obstacles.<sup>51</sup> Not until the second George Bush won a second term in 2004 did the retrenchment movement appear to have a major opportunity to enact legislation at the federal level.

The effort to nationalize tort law can be seen as a “third wave” of tort retrenchment. Some might enjoy the irony of Republican proposals to nationalize tort law by the same Party that embraced “state’s rights” rhetoric to explain its opposition to much civil rights legislation enacted during the 1960s, 1970s and 1980s. Nonetheless, the effort to nationalize significant aspects of tort law is well underway, and has been endorsed by major business interests.

During the first Bush administration (1988–92), then Vice-President Dan Quayle made tort reform a national political issue when he labeled the civil justice system a “self-inflicted competitive disadvantage” in a 1991 speech before the American Bar Association.<sup>52</sup> Quayle proposed as many as fifty anti-litigation reforms put forth by the President’s Council on Competitiveness.<sup>53</sup> While none of the reforms were implemented as federal legislation during George H.W. Bush’s administration, retrenchment has

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49. See Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 185 (1987).

50. See, e.g., BURKE, *supra* note 1, at 30 (“[T]ort reformers have made steady gains in the cultural war over litigation even as they have often lost particular political and legal battles.”); *Talk of the Nation: How Fear of Litigation Has Changed the Way People Work and Live*, (National Public Radio, Dec. 18, 2003), <http://cgood.org/assets/attachments/36.pdf> (last visited Aug. 1, 2005).

51. See BURKE, *supra* note 1, at 30–31. See generally American Tort Reform Ass’n, *State Reforms*, at <http://www.atra.org/states> (highlighting reforms since 1986, with the vast majority of reforms reported occurring at the state level) (last visited Aug. 1, 2005).

52. Vice President Dan Quayle, *supra* note 3, [http://www.vicepresidentdanquayle.com/speeches\\_StandingFirm\\_ABA\\_1.html](http://www.vicepresidentdanquayle.com/speeches_StandingFirm_ABA_1.html).

53. See *id.*

become a staple platform position of the Republican party ever since.<sup>54</sup> The Republican Party further elevated retrenchment to the national level after gaining control of both Houses of Congress in 1994, and making Tenet Nine of the Contract with America a mobilizing point for legal reform.<sup>55</sup>

Yet, a series of attempts to pass so-called "Common Sense tort reform bills" in the mid-1990s achieved only limited success.<sup>56</sup> Despite tort retrenchment's primary position in the political limelight, none of the forty-six medical malpractice reform bills introduced into Congress between 1990-1994 passed.<sup>57</sup> Other reform laws that did pass during President Clinton's administration from 1992-2000 tended to be minor in scope: limiting the liability of small airplane manufacturers; immunizing volunteers from litigation (but leaving their host organizations open to liability); taxing tort awards for emotional distress and punitive damages; and capping tort liability for Amtrak at \$200 million per accident.<sup>58</sup> Although the "Common Sense" legal reforms met with success in the Republican-dominated Houses during the 1995-96 Congressional sessions, they were eventually reduced to amended step reforms or eliminated entirely by presidential veto.<sup>59</sup>

Attempts to alter substantive tort law at both state and federal levels continue in 2005, and show no signs of abatement. In his State of the Union speech inaugurating his second term, President Bush endorsed three significant retrenchment bills.<sup>60</sup> The first, requiring removal of many class actions to federal court, was enacted in the first weeks of the 109th Congress, with Bush signing it into

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54. See BURKE, *supra* note 1, at 25.

55. See *Common Sense*, *supra* note 4, at 1769. Tenet Nine called for limits on punitive damages, product liability reform, and adopting the English rule of attorney fee-shifting, where the loser pays fees and costs. *Id.*

56. *Id.* at 1770-71.

57. See BURKE, *supra* note 1, at 31.

58. See *id.*

59. See *Common Sense*, *supra* note 4, at 1765 n.3; see also H.R. 956, 104th Cong. (1995), <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR00956:@@@L&summ2=m&#summary> (last visited Aug. 1, 2005) (bill and summary status of H.R. 956).

60. President George W. Bush, State of the Union Address (Feb. 2, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>).

law on February 18, 2005.<sup>61</sup> A second bill, which the Republican Party has proposed and Bush promises to sign, would cap non-economic medical malpractice damages at \$250,000.<sup>62</sup> The third major change would impose limits on asbestos liability.<sup>63</sup> Political prognosticators predict likely enactment of the second two bills as

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61. The legislation stalled in the Senate in 2004, but passed in both Houses in February 2005, with President Bush signing the legislation shortly thereafter. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-002, 119 Stat. 4 (2005). The legislation reflects what at least one scholar warns is a subtler, though potentially more impacting, retrenchment that aims to achieve substantive tort changes through federal *procedural law*. *See* JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 718-19 (2004). Professor Lind labels attempts at the national level to displace substantive law historically reserved to the states, "Procedural *Swift*," pointing in particular to the Multiparty, Multiforum Jurisdiction Act of 2002, and the Class Action Fairness Act ("CAFA") of 2003. *Id.* CAFA, as enacted in 2005, grants federal district courts original jurisdiction over class actions if the amount in controversy exceeds \$5 million and less than one-third of the plaintiffs are from the same state as the defendants. *See* Class Action Fairness Act of 2005 (February 18, 2005). It also limits the recovery of contingent fees by attorneys in settlements where plaintiffs are awarded coupons, establishes guidelines that federal district courts are to follow before approving settlements, and specifies requirements for serving notice of proposed settlements on federal and state officials. *Id.*

62. HEALTH Act of 2005, S. 354, 109th Cong. §§ 4-5 (2005) (setting a statute of limitations for any health care liability claim, regardless of the theory of liability, and limiting the recovery of non-economic damages to \$250,000, including damages for emotional pain, suffering, disfigurement, and hedonic damages); *see also* American Medical Association (AMA), *Physician Action Kit Sign-Up*, <http://www.ama-assn.org/ama/pub/category/10155.html> (last updated Jan. 19, 2005). The American Medical Association's "Physician Action Kit" is a ready-made packet enabling medical professionals to "mobilize physicians and patients in the fight to pass real medical liability reform legislation in the U.S. Congress." *Id.* One of AMA's most recently stated top priorities is professional liability reform. *See* AMA, *Key Objectives*, at <http://www.ama-assn.org/ama/pub/category/1912.html> (last updated November 2, 2004).

63. President George W. Bush, State of the Union Address (Feb. 2, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>) ("our economy is held back by irresponsible class-actions and frivolous asbestos claims—and I urge Congress to pass legal reforms this year."); *see also* 151 CONG. REC. S1009-42 (daily ed. Feb. 7, 2005) (statement of Rep. Specter). The bill seeks to establish a victims' trust fund capped at \$140 billion, and would compensate only those workers who can show proof of existing harm due to asbestos exposure. *Id.*

well, since the Republicans control both houses of Congress as well as the Presidency.

Enjoying such success, the tort retrenchment movement is likely to push for ever-greater changes to the civil justice system at both the state and federal level. But, what galvanized the tort retrenchment movement? Against what legal changes is the movement once again to transform the civil justice system reacting? In the next section, we describe in detail the types of changes that took place during the first decades of the 20th Century. We suggest that the tort retrenchment movement was spawned as a reaction to these changes in the legal system.

### III. 20TH CENTURY SOCIAL AND LEGAL DEVELOPMENTS THAT SHAPED THE CIVIL JUSTICE SYSTEM

Tort retrenchment arose as a reaction to a series of social and legal developments over the first three quarters of the Twentieth Century. In this Section, we set out five of the major developments that have shaped the American civil justice system. These five developments, we suggest, are the key issues with which tort reformers have yet to contend, but tort system challengers and defenders cannot ignore them because these issues have both shaped the American civil justice system, and are inextricably linked to the philosophical arguments of retrenchment.<sup>64</sup> In addition, the politics of retrenchment aligns the losers of the earlier battles against those groups who benefited from the earlier battles. Thus, it makes sense to review the earlier battles in order better to understand against what the current political movement is reacting.

The five developments are: (1) major social harms litigated through the civil justice system; (2) expansion of consumer and employee rights; (3) expansion of duties to protect others; (4) recognition of emotional harm as a significant and compensable loss; and (5) a dramatic increase in business-vs.-business tort litigation.

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64. Many defenders of the current tort system have not explicitly addressed how the ultimate goal of tort reform seeks to return the civil justice system to an earlier time, thus rolling back many of the progressive doctrinal developments within tort law that characterized the 1960's and 1970's. A major exception is the recent book, THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001).



Much of that within the civil justice system against which retrenchers rail reflects the compromises over these issues rendered by thousands of judicial opinions over many decades. Perhaps it goes without saying that the same political and economic forces that lost the earlier battles over the rules of tort law have reconfigured themselves as tort reformers, seeking from public opinion and legislative action what was earlier lost in the courtroom.

*A. Major Social Harms Litigated Through the  
Civil Justice System*

The United States does not have a comprehensive social insurance system through which injured persons can receive compensation for injuries suffered by products or accidents.<sup>65</sup> As a result, the civil justice system serves as the default mechanism for redress of such injuries. This compensatory function, although limited in scope, continues to be an important justification of the civil justice system.

In addition to providing a mechanism for compensating injured persons, the tort system plays another important role: the default *regulator of safety and economic power*.<sup>66</sup> Although the United States economy produces millions of products and systematically intersects with millions of lives on a daily basis, most of these products and processes are not regulated outside of the civil justice system.<sup>67</sup> With a few exceptions like the Food and Drug

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65. Although injured workers can receive limited compensation through Workers Compensation systems in place in every state, those programs cover only *workplace*-related injuries, which comprise just a fraction of actual injuries that occur each year. Additionally, some injured parties have purchased or are covered by health, life, or accident insurance policies. Reimbursements received from such insurance hinges on the terms of contracts negotiated outside the context of particular injuries, and often bear little relationship to the injuries victims suffer.

66. See, e.g., Marc Galanter, *The Regulatory Function of the Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61 (Robert E. Litan ed., 1993).

67. While the FDA regulates and approves a large volume of biological products, cosmetics, drugs, food, and medical devices, entire industries such as the herbal supplement industry remain largely unregulated by the FDA or other administrative agencies. For example, the FDA has authority to regulate herbal supplements only *after* the products have reached the market, with few exceptions. FDA, *Dietary Supplements: Overview*, at <http://vm.cfsan.fda.gov/~dms/supplmnt.html> (last visited Aug. 1, 2005). In 2003, sales of herbal

Administration, which has authority to approve, regulate, or ban the sale of drugs,<sup>68</sup> the products and processes of the most complex industrial economy in the world are regulated, if at all, through the civil justice system. In short, tort law establishes the background operating rules under which the social and economic system operates. As Oliver Wendell Holmes put it in an earlier context, the civil justice system establishes the ground rules for interactions in which persons across different classes compete in the "struggle for life"<sup>69</sup> and "victory in the battle of trade."<sup>70</sup>

In the 1960s and 1970s, the tort system experienced a dramatic increase in class action litigation over widespread instances of social injury, as distinguished from individual injury. The environmental movement highlighted toxic dumps and polluting factories; the prevalence of compelling marketing campaigns led to the use or ingestion of toxic products that produced devastating injuries; and the public became more aware of how careless corporations could contaminate their natural world. Nearly a dozen products whose safety was litigated during the 1970s and 1980s affected more than a quarter of a million people.<sup>71</sup> One product alone, asbestos, marketed as though safe, but known for decades by its major manufacturer to

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supplements amounted to \$20.1 billion and at least 16% of Americans use these products. Jane Spencer, *The Risks of Mixing Drugs and Herbs*, WALL ST. J., June 22, 2004, at D1, 2004 WL-WSJ 56932593. Due to the lack of legislative approval for increased FDA regulation of herbal supplements, civil litigation is one of the few avenues through which to bring attention to and obtain recourse for the injuries caused by these products.

68. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–309 (2004).

69. *Vegeahn v. Guntner*, 167 Mass. 92, 106–07 (1896) (Holmes, C.J., dissenting).

If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. [It] is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests . . . . [T]he policy of allowing free competition justifies the intentional inflicting of temporal damage . . . when the damage is done . . . in reaching the end of victory in the battle of trade.

*Id.* See also O.W. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

70. See *Vegeahn*, 167 Mass. at 106.

71. See Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 193–94 fig. 3 (2001).

cause serious health problems to those exposed to its fibers, has adversely affected the health of millions of Americans.<sup>72</sup> Although the civil justice system had not previously been employed to address widespread social injuries caused by industry, creative lawyers crafted tort lawsuits to bring to trial those who were allegedly responsible, and to force billions of dollars of payments to millions of victims.

The transformation of the civil justice system, from one in which garden variety disputes were adjudicated into one in which major segments of the entire society could become embroiled in litigation, transformed the public's understanding of the civil justice system. It also had a draining effect on the coffers of those held or thought responsible for creating or expanding the scope of harm to the public. This transformation of the civil justice system from small claims court to a redistributive agency had a profound impact on the business community.

Importantly, the civil justice system did not *create* these social harms; instead, the legal system *addressed* them. But, from the standpoint of businesses sued for complex injuries such as exposing citizens to asbestos or creating toxic dumps, the tort system altered their capacity to produce products without worrying about externalities.

If litigation is indeed increasing, part of the explanation has to do with the far greater complexity of our society today as compared with fifty years ago. You cannot have claims brought for defectively designed automobiles unless there are automobiles. You cannot have claims for asbestos-related injuries unless producers, manufacturers, distributors, and installers have produced, manufactured, and installed asbestos creating the risk of exposure of a known toxic substance to millions of people. You cannot have massive toxic harms unless industry contaminates air, land, or water.

As the society has become increasingly complex, and the harms a single producer or segment of the economy could create ever more

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72. It has been estimated that over 600,000 lawsuits have been filed over asbestos injuries alone. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT, at vi (RAND Institute for Civil Justice, 2002). It is unclear how many people have suffered injury but have not sued. *Id.* at vii.

dramatic, the challenges for a civil justice system justified by an ideology of individualistic dispute-resolution have been profound. When the issue is the liability of someone who raises a stick to separate two fighting dogs and who accidentally hits a bystander,<sup>73</sup> the impact of the decision whether to hold the actor liable to the bystander does not radically impact the rest of the economy—at least not immediately. If courts find manufacturers of a class of major drugs liable to thousands of injured patients, however, the effects are profound—and dramatic.<sup>74</sup>

For at least the past fifty years, litigation has been used as a way to seek redress for social harms perceived as being caused, or at least enabled by, product manufacturers and distributors.<sup>75</sup> Since one goal of tort retrenchment is to undermine the capacity of the civil justice system to address such systemic ills, it is important to identify the types of cases the civil justice system has been addressing that have led to increasing political pressure to change that system.

### 1. Asbestos

Asbestos litigation has become a symbol for toxic torts and class actions, and represents a major social harm that has been, and continues to be, resolved through the civil justice system. The dangerousness of workplace asbestos exposure was known before World War II, and affected workers in industries later identified as the primary and secondary manufacturing, shipbuilding and repair, and construction industries.<sup>76</sup> In 1965, the research of Dr. Irving

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73. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 294 (1850).

74. The recent and controversial deliberations over whether to withdraw cox-2 pain inhibitors from the market, combined with the filing of multiple class actions, illustrate the financial loss at stake for drug manufacturers. See John Leland, *Pain Pills Withdrawn, Many Renew Search for Relief*, N.Y. TIMES, Mar. 6, 2005, at §1-30 (noting that cox-2 inhibitors accounted for nearly \$5.7 billion in annual sales); see also *In re Vioxx Prods. Liab. Litig.*, No. 1657, 2005 U.S. Dist. LEXIS 2527 (J.P.M.L. Feb. 16, 2005) (granting defendant's motion to centralize 148 actions pending in 41 federal district courts).

75. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 451 (1999).

76. CARROLL ET AL., *supra* note 72, at 14–15.

Selikoff and others confirmed the link between insulation and asbestosis, or scarring of the lung tissue.<sup>77</sup>

Litigation to obtain compensation for injured workers and other exposed parties (an estimated 600,000 claimants have filed as of 2000) followed slowly, since the health detriments one suffers from repeated exposure often takes years to develop.<sup>78</sup> Now, however, the problems associated with asbestos, and the claims still being pursued (all estimates agree that at best, one-half of all potential claims have been filed),<sup>79</sup> are viewed by both plaintiffs' and defendants' lawyers as relatively straightforward cases since asbestos is considered a "mature tort."<sup>80</sup> The term refers to the fact that the scientific and legal issues of asbestos exposure have been litigated for decades, and there is little left to discover or adjudicate on an individual basis.<sup>81</sup> Frederick M. Baron, past president of American Trial Lawyers Association, has stated that, "'We have so many claimants, and it's not rocket science to figure out what they're due.'"<sup>82</sup> The number of claims filed in recent years has increased dramatically, although the severity of those claims has declined.<sup>83</sup> Attempts to pass federal legislation that would set up a fund to deal with all future asbestos claims may eventually succeed due to the breadth of experience with asbestos litigation; the specifics of the fund's size and the fund's beneficiaries, however, remain subject to debate.

The types of claims and structure of litigation brought by asbestos plaintiffs have evolved over time. At first, individual litigants at a late-stage of disease initiated claims; large class actions gradually followed as both plaintiffs' lawyers and defendant corporations sought to consolidate suits.<sup>84</sup> With time, litigants have

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77. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1085 (5th Cir. 1973).

78. See CARROLL ET AL., *supra* note 72, at 40-41.

79. See *id.* at 78.

80. Alex Berenson, *Lawyers Silent on Possible Asbestos Trust: A National Fund Would End Liability Suits, Curbing Legal Fees*, N.Y. TIMES, Apr. 26, 2003, at C2.

81. *Id.*

82. *Id.*

83. See CARROLL ET AL., *supra* note 72, at 41.

84. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973) (finding defendant manufacturers strictly liable to the decedent, an insulator of 33 years who died from asbestosis and mesothelioma). The *Borel*

brought claims at earlier stages of disease, as medical knowledge, diagnostic capabilities, and experience calculating compensation have enabled plaintiffs to recover before experiencing advanced stage asbestos-related malignancies. Between 1991 and 2000, 89% of all dollars paid to asbestos litigants were to non-malignant plaintiffs.<sup>85</sup> Recently, the U.S. Supreme Court upheld recovery for the mental anguish of six railroad employees experiencing asbestosis, a noncancerous scarring of the lungs, caused by their fear of developing cancer.<sup>86</sup>

Many companies and/or employers against whom asbestos claims have been brought eventually declared or are in the process of declaring bankruptcy, or were bought by larger corporations who agreed to assume the asbestos-related liability. Settlement has been an attractive option for defendants to reduce future uncertainty about asbestos liability, although the U.S. Supreme Court has struck down defendants' attempts to negotiate settlements for all future claims.<sup>87</sup> Halliburton Co., for example, is nearing an anticipated \$2 billion settlement for long-standing asbestos litigation, a major factor in the increase in the company's stock price in early 2004.<sup>88</sup> Asbestos litigation has bankrupted more than sixty companies, resulting in the loss of an estimated 60,000 jobs, and an additional 2,000 companies are being sued.<sup>89</sup> Twenty-two of those companies have filed for bankruptcy since January 1, 2000.<sup>90</sup> At least five defendants have paid on claims worth more than \$1 billion, with the total number of defendants exceeding 6,000 entities.<sup>91</sup>

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decision paved the way for many asbestos litigants. See CARROLL ET AL., *supra* note 72, at 2.

85. CARROLL ET AL., *supra* note 72, at 64.

86. *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 141–145 (2003).

87. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

88. James Flanigan, *Investors Are Looking Beyond Accusations at Halliburton, for Now*, L.A. TIMES, Feb. 8, 2004, at C1.

89. Philip K. Howard, *Tipping the Scales*, L.A. TIMES, June 29, 2003, at R11 (reviewing WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* (2003)).

90. CARROLL ET AL., *supra* note 72, at 71 (“[W]e are aware of another four asbestos-related bankruptcies for which we have not yet been able to identify the filing date.”).

91. *Id.* at 55.

The challenges posed by asbestos-related harms and litigation are not yet resolved. For exposures that occurred from 1940 through 1979, estimates place the number of premature deaths attributed to asbestos-related cancer at 225,000.<sup>92</sup> Although a study funded by the Johns-Manville Corporation projected far fewer deaths, the 225,000 figure does not include deaths resulting from severe asbestosis, post-1979 exposures, or exposures occurring in other industries.<sup>93</sup>

Asbestos claims have posed a major challenge to the civil justice system, not only because of the sheer number of victims, but because of the serious impact on so many companies. The civil justice system was not designed from the ground up to administer and adjudicate major societal harms, but it has grown into that role. No other social institution is presently situated to adjudicate these injuries besides common law courts.

At the same time, the asbestos litigation provides a ready target for retrenchment. Many large companies have asbestos-related liabilities, and these liabilities are not likely to reach an endpoint within the next decade. The administrative cost to both plaintiffs and defendants is large. The risk of bankruptcy hovers over enterprises, even while disease and injuries suffered by victims remain dormant.

No one seeks to bankrupt an ongoing enterprise responsible for asbestos-related harms, but courts have continued to hold businesses responsible for manufacturing or distributing asbestos throughout the economy. It is the nature of responsibility for a major social harm such as asbestos injuries, and the degree to which enterprises should continue to be held liable for future injuries as they occur, that lies at the heart of the challenge posed by the tort retrenchment movement to asbestos liability. The civil justice system began hearing increasing numbers of asbestos-related cases starting with *Borel v. Fibreboard Paper Products Corp.*<sup>94</sup> in 1974. It is no accident that the American Tort Reform Association was founded just two years later.

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92. *See id.* at 16.

93. *See id.*

94. 493 F.2d 1076 (5th Cir. 1974).

## 2. Tobacco

In the scheme of social harms, the effects of widespread tobacco use and addiction tip the scales in a way that few, if any, other hazardous substances have managed to do. Whether or not litigation should set policy governing the nation's largest health concern, the fact remains that the civil justice system has been the primary medium through which tobacco policy has been set.<sup>95</sup>

Tobacco use is the leading cause of death in the United States, resulting in more than 440,000 deaths each year.<sup>96</sup> It is estimated that regular smoking will lead to death or disability in one half of cigarette smokers.<sup>97</sup> Moreover, at least 27 studies have concluded that tobacco use is "the single most avoidable cause of disease, disability, and death in the United States."<sup>98</sup> Smoking rates vary across racial and ethnic groups, with American Indian/Alaska Native (AI/AN) adults exhibiting the highest prevalence of cigarette use (40%), compared to lower rates among non-Hispanic whites (27.4%), non-Hispanic African Americans (25.7%), and the lowest rate among the Chinese population (12.3%).<sup>99</sup> Likewise, among youths, AI/ANs had the highest smoking prevalence, at 27.9%, followed by non-Hispanic whites (16%).<sup>100</sup>

Findings on the deleterious health effects of smoking have transformed American culture and lifestyle, not only by raising the public's awareness but also by sparking a massive image repair campaign among "big tobacco" interests. The Marlboro Man is parodied as the "Impotent Man" along a major thoroughfare in Los

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95. See Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 188–89 (2000) (positing that both private litigation and public State Medicaid actions, fail to adequately address the harm caused by the tobacco industry).

96. CTRS. FOR DISEASE CONTROL & PREVENTION, TARGETING TOBACCO USE: THE NATION'S LEADING CAUSE OF DEATH 2 (2004), [http://www.cdc.gov/nccdphp/aag\\_osh2004.pdf](http://www.cdc.gov/nccdphp/aag_osh2004.pdf).

97. *Id.*

98. *Id.*

99. Ctrs. for Disease Control & Prevention, *Prevalence of Cigarette Use Among 14 Racial/Ethnic Populations – United States, 1999–2001*, 53 MORBIDITY & MORTALITY WKLY. REP., Jan. 30, 2004, at 1–2, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5303a2.htm>.

100. *Id.* at 1.



Angeles,<sup>101</sup> smoking is banned in public places such as bars and restaurants, and commercials sponsored by tobacco companies dot the advertising landscape with messages aimed at promoting health and education.<sup>102</sup> Many of these changes have arisen as a result of settlement agreements with tobacco companies, which have required a reduction in cigarette advertising and decreased accessibility of tobacco products to youth.<sup>103</sup>

Until 1994, only two plaintiff claims out of 813 filed since 1954 won against tobacco companies, although courts have substantially reversed those successes on appeal.<sup>104</sup> Many of the arguments “appealed to a balancing of the social utility of tobacco against the established harm it causes to hundreds of thousands of citizens every year, an approach grounded in the Restatement of Torts.”<sup>105</sup> By 1999, however, the seemingly impenetrable barriers set up by tobacco companies to avoid liability were finally overcome.<sup>106</sup>

Class action litigation has been the primary tool by which plaintiffs and state governments have won claims for deception and fraud (including misrepresentation) against tobacco companies. Tobacco defendants have tried to remove these cases to federal court in the hopes that either the class will be decertified, or that damages awarded will be lower than what they would have been in state court. Recently, judicial reconsideration of certification procedures and tightened review of decisions have contributed to a reversal of some prior plaintiff successes.<sup>107</sup>

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101. See Frances Anderton, *Out There: Los Angeles; If Billboards Make It Here, They'll Make It Anywhere*, N.Y. TIMES, May 30, 1999, § 9, at 2.

102. See, e.g., Philip Morris USA, *About Us: TV Advertisements*, at [http://www.pmusa.com/about\\_us/tvads/default.asp](http://www.pmusa.com/about_us/tvads/default.asp) (last visited Aug. 1, 2005).

103. See NATIONAL ASS'N OF ATT'YS GEN., TOBACCO SETTLEMENT DOCUMENTS: MASTER SETTLEMENT AGREEMENT, 18–36 (1998), <http://www.naag.org/issues/issue-tobacco.php>.

104. LaFrance, *supra* note 95, at 190.

105. *Id.* at 191.

106. *Id.* at 192.

107. See *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003) (decertifying a class of citizens and residents of Florida either suffering from smoking-related disease or who had died, and also reversing the damages awards, including \$145 billion in punitive damages, three years after one of the longest ever civil trials had ended), *review granted*, 873 So. 2d 1222 (Fla. 2004) (each side granted twenty minutes of arguments to be heard on October 6, 2004); see also *Whiteley v. Philip Morris, Inc.*, 117 Cal. App. 4th

Private plaintiffs continue to recover from big tobacco, although results have been mixed.<sup>108</sup> In an Oregon case on remand from the Supreme Court, the Oregon Court of Appeals upheld \$79.5 million in punitive damages, even in light of the guidelines set forth in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>109</sup>

The harms associated with the actions of the tobacco industry and consumers' use of tobacco are also unique in that they generated a concerted effort among States' Attorneys General to obtain relief for the public. Beginning in 1997, State Attorneys General filed suit against tobacco companies and used their resources to compel the discovery of key documents previously unavailable to plaintiffs. This paved the way for punitive damages awards in light of evidence of fraud and misrepresentation. It also resulted in a Master-Settlement Agreement (MSA), however, after four states settled individually and the remaining forty-two reached a group settlement.<sup>110</sup> The MSA settled with the tobacco companies for \$220 billion, but also relieved the tobacco industry of significant liability.<sup>111</sup> Lauded by some as "the straw that broke Joe Camel's back[,]," the MSA resulted in multi-billion dollar settlements with many states, to be used in part toward paying for smoking-related health care costs and prevention programs.<sup>112</sup> The federal government also sued major tobacco manufacturers based on statutes

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653 (2004) (smoker and her husband brought suit under theories of fraud and negligent design after smoker contracted lung cancer. Trial court awarded \$1 million in compensatory and \$20 million in punitive damages, but on appeal the defendant tobacco manufacturers were granted judgment on the negligent design claim and the fraud claims were remanded since the jury was not instructed that the companies could not be held liable for a ten year period as provided for by California statute).

108. See, e.g., *Williams v. Philip Morris, Inc.*, 92 P.3d 126, 145 (Or. Ct. App. 2004) ("[I]t is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case.").

109. 538 U.S. 408 (2003). But see *Henley v. Philip Morris, Inc.*, 88 P.3d 497 (Cal. 2004) (granting review to consider the reduction of punitive damages awarded in previous proceedings).

110. See LaFrance, *supra* note 95, at 193, 195.

111. *Id.* at 197.

112. See *Florida Governor Hails Tobacco Settlement: "The Straw that Broke Joe Camel's Back"*, CNN.com, Aug. 25, 1997, at <http://www.cnn.com/US/9708/25/tobacco.11am/> (last visited Aug. 1, 2005).

allowing recovery for medical expenses and fraud, such as the Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>113</sup>

Tobacco policy continues to be set largely by litigation through the civil justice system. The U.S. Supreme Court interpreted the Food & Drug Act not to permit the Food and Drug Administration (FDA) to regulate tobacco or cigarettes.<sup>114</sup> While the MSA and other settlements reached with tobacco companies have certainly sparked positive changes in the marketing and distribution of cigarettes, mixed results have been observed with respect to cigarette consumption and continued advertising practices by some cigarette manufacturers.<sup>115</sup> Litigation may continue to play a major role in shaping tobacco policy nationwide, especially if political initiative to address the public health problem through legislation remains stagnant.

Like asbestos litigation, there does not seem to be an end in sight for tobacco-related litigation. Unlike asbestos, however, which was abandoned as an insulating product once its harms became known, the harm of cigarette smoking are well-known, yet companies remain free to sell and manufacture the product.

Many broad tort retrenchment efforts—such as class action changes, damage caps, removal of joint and several liability, and limits on punitive damages—will have a significant impact on future

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113. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961(1990). See *United States v. Philip Morris, Inc.*, 310 F. Supp. 2d 68, 76 (D.C. Cir. 2004) ("Here, Defendants do not point to any sign that Congress wished to insulate them from federal statutory rules governing fraud." Defendants' summary judgment motion was denied.), *stay granted sub nom.*, *United States v. British Am. Tobacco (Invs.) Ltd.*, No. 04-5207, 04-5208, 2004 U.S. App. LEXIS 11123 (D.C. Cir., June 4, 2004).

114. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (affirming the Appellate Court's holding that Congress did not intend for the Food & Drug Administration (FDA) to regulate tobacco under the Food, Drug, and Cosmetic Act).

115. See, e.g., NAT'L ASS'N OF ATT'YS GEN., *supra* note 103, at <http://www.naag.org/issues/issue-tobacco.php> (last visited Aug. 1, 2005) (citing an August 2001 issue in the *New England Journal of Medicine*, which found that the money spent on advertising of three cigarette brands in youth magazines increased after the settlement was reached). In June 2002, California's Supreme Court in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516 (2003), held that R.J. Reynolds Tobacco Company had violated the MSA's restrictions on advertising at sporting events.

tobacco litigation. With respect to tobacco regulation, tort retrenchment is driven in part by fear of liability for past behavior, but also by fear of what standards common law courts might impose in the future. Cigarette manufacturers would obviously like to instantiate many limits now on the capacities of future plaintiffs to recover damages, before the next wave of tobacco-related injuries occurs and litigation begins.

### 3. Litigation Over Female-Only Products

Injuries caused by products manufactured specifically for women drove a large volume of litigation aimed at the pharmaceutical and medical device industries in the 1970s and 1980s.<sup>116</sup> The Dalkon Shield, an intrauterine birth control device later found to increase the risk for pelvic inflammatory disease and sterility, and Bendectin, a morning sickness drug administered to pregnant women that caused birth defects in their children, were major sources of product liability litigation in addition to asbestos.

Estimates place the number of lawsuits attributed to the Dalkon Shield in excess of 7,500, involving some 300,000 plaintiffs, and bankrupting the device's manufacturer A.H. Robins.<sup>117</sup> The social harm imposed by Merrell Dow's Bendectin similarly impacted large numbers of women. By the time the product was withdrawn from the market, it had been distributed to nearly 25% of all pregnant women in 22 different countries.<sup>118</sup> The safety of both these products was litigated through the civil justice system, resulting in massive administrative headaches, as well as huge financial costs.

Prior to the discovery of hazards posed by the Dalkon Shield and Bendectin, another female-only product exacted immeasurable harm before finally being withdrawn from the market in 1971 by FDA order. Diethylstilbestrol (or "DES") was marketed as a synthetic form of estrogen for the prevention of miscarriages by

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116. See, e.g., TERENCE DUNGWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS* 38-41 (1988); see also PETER W. HUBER & ROBERT E. LITAN, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 295 (1991).

117. See DUNGWORTH, *supra* note 116, at 39-40; DEBORAH R. HENSLER ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 10 (1987).

118. HUBER & LITAN, *supra* note 116, at 338.

nearly 300 pharmaceutical companies between 1941 and 1971.<sup>119</sup> The drug was eventually banned after it was found to cause vaginal cancer and precancerous growths in the daughters of women who took DES.<sup>120</sup> The plaintiffs prevailed against the defendant manufacturers of DES on a theory of market share liability, because all DES was chemically identical, most women were not aware of the drug's manufacturer, and by the time injury arose in the daughters it was impossible to pinpoint the particular manufacturer.<sup>121</sup>

Litigation over injuries resulting from (and allegedly resulting from) breast implants is the latest use of the civil justice system to deal with social harms experienced by women. A class action certified in 1992 eventually resulted in a proposed \$24 million settlement with implant manufacturers that included an injunction against the further manufacture, sale, and research of silicone gel implants.<sup>122</sup> Whether or not there is a causative link between illness and the use of silicone breast implants in women, it is difficult to deny that litigation was the underlying force in bringing the Institute of Medicine (IOM) to seriously examine the issue and report the results to the public. In 1999, the IOM issued a report entitled, *Safety of Silicone Breast Implants*.<sup>123</sup> This critical report refuted assertions that proliferated during the 1990s, suggesting a link between silicone implants and a syndrome suffered by thousands of women who had received the implants.<sup>124</sup>

#### 4. Dioxin (Agent Orange) Litigation

Dioxin (popularly referred to as "Agent Orange") is the primary chemical blamed for respiratory cancer and other chronic illnesses

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119. *Ashley v. Boehringer Ingelheim Pharms. (In re DES)*, 7 F.3d 20, 21 (1993).

120. *Id.*

121. *Id.* at 21–22. Under the theory of market share liability, as adopted in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, *cert. denied*, 449 U.S. 912 (1980), manufacturers are held liable for injuries caused by a common product sold into the stream of commerce, proportionate to the company's market share of the product in that jurisdiction.

122. *See In re Silicone Gel Breast Implant Prod. Liab. Litig.*, No. CV 92-P-10000-S 1993 U.S. Dist. LEXIS 21,236, \*8–\*9 (N.D. Ala. 1993).

123. INSTITUTE OF MEDICINE, *SAFETY OF SILICONE BREAST IMPLANTS* (National Academy Press 1999).

124. *See id.* at 11.

among Vietnam veterans. An examination of all available evidence indicates that dioxin acts as a promoter in the regulation of cell proliferation and differentiation.<sup>125</sup> Although reports do not officially conclude that exposure to dioxin in Vietnam causes respiratory cancer in veterans, the data do indicate that the chemical persists in the body long after exposure, and therefore, the risk of respiratory cancer posed by exposure could last for many decades.<sup>126</sup>

Service personnel and their relatives began filing lawsuits against dioxin manufacturers in the 1980s. The “Agent Orange” litigation is an example of how the civil justice system can be used to obtain crucial information when other avenues are closed. Similar to the groundbreaking cases against tobacco companies, plaintiffs in dioxin litigation were able to obtain court orders for the unsealing of manufacturer documents.<sup>127</sup> Class actions have been the primary means by which Agent Orange litigation has proceeded, due to the large number of potential plaintiffs (tens of thousands), the ability to fairly ensure that the financial burden falls on the party that should bear the cost, and the likelihood of encouraging settlement.<sup>128</sup>

### 5. Suits Against Gun Manufacturers and Dealers

In 2001, 66% of all homicides were committed with a firearm (including handguns, shotguns, and other firearms).<sup>129</sup> Notably, firearm violence decreased 63% between 1993 and 2001.<sup>130</sup> Each year, however, the Department of Justice spends millions of dollars

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125. See INSTITUTE OF MEDICINE, VETERANS AND AGENT ORANGE: UPDATE 2002, (The National Academies Press 2003), <http://print.nap.edu/books/0309086167/html.R3.html#pagetop>.

126. See INSTITUTE OF MEDICINE, VETERANS AND AGENT ORANGE: LENGTH OF PRESUMPTIVE PERIOD FOR ASSOCIATION BETWEEN EXPOSURE AND RESPIRATORY CANCER (The National Academies Press 2004).

127. See *In re* “Agent Orange” Prod. Liab. Litig., 821 F.2d 139, 148 (2d Cir. 1987) (“Any inconvenience to which appellants are subjected certainly is outweighed by the enormous public interest in the Agent Orange litigation and the compelling need for class members and non-class members alike to evaluate fully the efficacy of settling this litigation.”).

128. *E.g.*, *In re* “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718, 720–21 (E.D.N.Y. 1983).

129. See CRAIG PERKINS, U.S. DEP’T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, 1993–2001: WEAPON USE AND VIOLENT CRIME 1, 8 (2003).

130. *Id.* at 10.

on projects designed to reduce gun violence in neighborhoods nationwide.<sup>131</sup> From 1980 through 1998, firearms were used in 265,252 homicides and 321,355 suicides in the U.S.<sup>132</sup> Perhaps most notable is the disparity in who is most affected by gun violence in the U.S. In the early 1990s, the firearms-related death rate for children less than fifteen years old was twelve times higher than the combined rate in twenty-five other industrialized countries.<sup>133</sup> Moreover, the rate of firearm deaths was twice as high among Blacks compared to Whites in 2001, and homicide by firearm was the second leading cause of death for Hispanic youth aged 15–24.<sup>134</sup>

In general, the gun industry is viewed as one of the most unregulated industries in the country.<sup>135</sup> Legislation in the area of gun control exists at state and federal levels, although some criticize it as piecemeal or not sufficiently far-reaching. The Federal Assault

131. Press Release, U.S. Dep't of Justice, Office of Justice Programs, Justice Department Awards Washington Over \$1 Million for Project Safe Neighborhoods, (Sept. 30, 2003) *available at* <http://www.ojp.usdoj.gov/pressreleases/BJA03163.htm> (Project Safe Neighborhoods is aimed at reducing gun crime by providing existing local programs with additional tools and funding. Over \$900 million in grant funding has been committed to the program over a three-year period.).

132. See National Ctr. for Injury Prevention & Control, *WISQARS Leading Causes of Death Reports, 1981–1998*, at <http://webappa.cdc.gov/sasweb/ncipc/leadcaus9.html> (Using Search Terms: Category of Causes—Violence-Related Injuries Only, 1981–1998) (last visited Aug. 1, 2005).

133. See Ctrs. for Disease Control & Prevention, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children – 26 Industrialized Countries*, 46 MORBIDITY & MORTALITY WKLY. REP., 101, 101–05, Feb. 7, 1997, <http://www.cdc.gov/mmwr/preview/mmwrhtml/00046149.htm>.

134. See Ctrs. for Disease Control & Prevention, *Web-based Injury Statistics Query and Reporting System (WISQARS)* (Whites had an age-adjusted rate of 9.19 versus Blacks who had an age-adjusted rate of 18.31), at <http://www.cdc.gov/ncipc/wisqars/> (last visited Aug. 1, 2005) (Injury Mortality Reports, Data from 1999 and later) (Search Terms: Cause or Mechanism of Injury—Firearm, Year 2001–2001, Race-Black and Race-White); National Ctr. for Injury Prevention & Control, *WISQARS Leading Causes of Death Reports, 1999–2002*, at <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html> (Data from Leading Causes of Death) (Search Terms: Year(s) of Report-2001–2001, Race-All Races, Hispanic Origin-Hispanics).

135. See, e.g., Rachana Bhowmik, *Aiming For Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & POL'Y 67, 68 (2002) (pointing out the lack of federal safety or health oversight of the gun industry, but acknowledging some level of regulation at the state level).

Weapons Act (FAWA), signed into law in 1994, is one example of legislation banning the sale of semi-automatic assault weapons, but it expired without executive efforts to renew it.<sup>136</sup> Assault weapons such as those banned by the FAWA are preferred by criminals over law-abiding citizens and have been used in numerous mass murders.<sup>137</sup> According to multiple reports, crime resulting from the use of assault weapons has dropped since the enactment of the FAWA.<sup>138</sup>

In the face of this, public interest groups continue to seek more expansive legislation, such as that which would eliminate attempts by the gun industry to obtain legal immunity, provide law enforcement with enhanced evidentiary resources, require criminal background checks for all gun sales, and improve gun safety technology.<sup>139</sup> Although state-level efforts to reform the gun industry have occurred through a mixture of legislation and litigation, arguably litigation has been the more effective tool for defeating initiatives sought by gun industry supporters.<sup>140</sup>

As in the case of tobacco litigation, public entities—particularly cities and towns—are litigating the harms allegedly caused by the gun industry in the absence of successful private suits (individual or class action) and effective legislation.<sup>141</sup> The aims of public litigation also mirror the tobacco experience, and include curbing the

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136. See, e.g., Brady Campaign to Prevent Gun Violence, *Assault Weapons Threaten Public Safety: The Federal Assault Weapons Act*, at [http://www.bradycampaign.org/facts/issues/?pages=aw\\_renew](http://www.bradycampaign.org/facts/issues/?pages=aw_renew) (last visited Aug. 1, 2005).

137. See *id.* (citing a 1994 report by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and pointing to murderous episodes at workplaces, schools, and public areas between 1984 and 1993).

138. *Id.*

139. See Brady Campaign to Prevent Gun Violence, *Issues*, at <http://www.bradycampaign.org/facts/issues> (last visited Aug. 1, 2005) (describing the types of legislative action sought and supported by the Brady Campaign).

140. See Brady Campaign to Prevent Gun Violence, *The Legal Action Project*, at <http://www.gunlawsuits.org/defend/defend.php> (last visited Aug. 1, 2005) (describing the Project's courtroom success in defending gun safety laws challenged by members of the gun industry).

141. See Philip C. Patterson & Jennifer Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 550 (2000).



gun industry's marketing and distribution practices, recovering some of the public costs associated with gun violence, and effecting changes in gun design.<sup>142</sup> Before the launch of city and county-led litigation, which began in 1998, the Firearms Litigation Clearinghouse (FLC) formed in 1981 "to facilitate the reduction of firearms injuries through the use of the civil justice system."<sup>143</sup> Finally, as with the experience of tobacco litigation, gun industry litigation has sparked changes beneficial to the public's safety.<sup>144</sup>

Litigation initiated by local and state governments has been based on claims ranging from negligent marketing and distribution to product liability and public nuisance.<sup>145</sup> Successful litigation against gun manufacturers and distributors has been slow coming, however, particularly in light of several setbacks.<sup>146</sup> Critics of the state and

142. *Id.*

143. See Coalition to Stop Gun Violence, *Firearms Litigation Clearinghouse*, at <http://www.csgv.org/issues/litigation/> (last visited Aug. 1, 2005).

144. See, e.g., Brent W. Landau, *State Bans on City Gun Lawsuits*, 37 HARV. J. ON LEGIS. 623, 626 (2000).

Bob's Sports Headquarters, a gun shop located in the suburbs of Chicago, agreed to strict guidelines for its firearms sales to settle the lawsuit brought by Chicago and Cook County, Illinois. Fetla's Trading Company, a gun dealer, settled a lawsuit brought by Gary, Indiana by agreeing to cease the sale of handguns and pay the city \$10,000. Colt's Manufacturing Company announced that it would stop selling handguns to civilians other than gun collectors. And, in the most significant development so far, Smith & Wesson agreed to a sweeping set of changes in the way it conducts its business.

*Id.* (footnotes omitted).

145. See Coalition to Stop Gun Violence, *supra* note 143, at <http://www.csgv.org/issues/litigation>. See also Patterson & Philpott, *supra* note 141, at 582–96.

146. See, e.g., *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (1999), *rev'd*, 26 Cal. 4th 465 (2001) (Survivors and representatives of the victims of a shooting rampage by a disgruntled ex-employee of a San Francisco law firm that resulted in eight deaths and six serious injuries sued the assault weapon's manufacturer. The Supreme Court reversed the Appellate court's reversal of summary judgment in favor of a gun manufacturer.); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 30 (2d Cir. 2001) (victims of handgun violence obtained a favorable verdict against gun manufacturers on their theory of negligent marketing, but the complaint was dismissed on appeal after the New York Court of Appeals—answering two certified questions—found that the manufacturers had no duty to control the marketing and distribution of their products by third-parties, and that market share liability was inapplicable since

local government suits against the gun industry abound. Some states, in fact, have passed laws limiting or entirely preempting the ability of local cities and municipalities to bring suits.<sup>147</sup> Nonetheless, many advocates of the litigation point to the decades-long battle to find success in litigation against the harms caused by cigarettes, and counsel patience.

In sum, the civil justice system has been the forum in which major social harms have been litigated. The growth of such major class actions challenging the safety of products of significant portions of business enterprises, and resulting in large damage awards, contributed to the political support for the tort retrenchment movement.

While one may question whether a different governmental structure—such as a social insurance scheme—would have more efficiently adjudicated responsibility and issued payments to victims in these massive litigations, the civil justice system was the only institution available to individual claimants to make their case. Tort change advocates may purport that proposed cutbacks address spilled coffee cups<sup>148</sup> and overreaching claimants, but the reality of major

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guns are not fungible); *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 213 (App. Div. June 24, 2003) (affirming defendant manufacturers' motion to dismiss after New York's Attorney General filed suit on the theory that unlawful possession of handguns manufactured and distributed by defendants constituted a public nuisance), *appeal denied*, 801 N.E.2d 421 (N.Y. Oct. 21, 2003); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003) (plaintiffs properly showed that defendant gun manufacturers had created a public nuisance with the manufacture and distribution of their guns, but failed to demonstrate an injury different from that suffered by the public at large and therefore their cause of action failed under New York law).

147. *E.g.*, Landau, *supra* note 144, at 624–25 (in many instances this legislation has been proposed by, or heavily lobbied for by, the National Rifle Association).

148. Numerous tort reform organizations, and other independent groups, used Stella Liebeck's lawsuit against McDonald's as a battle cry for reform in the mid-1990's. *See, e.g.*, The TRUE Stella Awards, at <http://www.stellaawards.com> (last visited Aug. 1, 2005) (showcasing abuses of the tort system in America and naming an award for such abuse after Stella Liebeck). For a more complete version of the actual damage sustained by Stella Liebeck, see Andrea Gerlin, *A Matter of Degree: How a Jury Decided That One Coffee Spill Is Worth \$2.9 Million*, WALL ST. J. EUR., Sept. 2, 1994, at A1 (noting the severity of Liebeck's injuries, and McDonald's refusals to settle). The trial court eventually reduced the \$2.7 million punitive damage

tort litigation throughout the 1970s, 1980s, and 1990s is that the civil justice system successfully adjudicated major social harms, and huge damages or settlements were rendered against powerful business and industrial groups.

The growth of tort reform as a political movement parallels and resists these major social litigations. The tort retrenchment movement grew in force alongside increased litigation involving widespread injuries. It may be helpful to understand the political appeal of tort retrenchment against that backdrop.

### *B. Expansion of Consumer and Employee Rights*

The latter part of the 20th century witnessed important changes in the power relationship between businesses on the one hand, and consumers and employees on the other. These relationships are characterized by ongoing, contractual-type relationships. In this section, we address how tort law has transformed these relationships in order to accord greater protections to consumers and employees; in contrast, increased responsibilities have been imposed on employers, manufacturers, and professionals. Much of the political support for tort retrenchment comes from the groups (manufacturers, employers, professionals) that strenuously fought against increased duties imposed by the civil justice system. The tort retrenchment movement offers a channel to scale back those duties.

To summarize the discussion that follows, widespread changes in tort law resulted in (1) increased consumer and bystander rights against product manufacturers and retailers; (2) greater power to investigate and bring malpractice suits against doctors, lawyers, and other professionals; and (3) important limitations on employer power to hire and fire employees at will, or to discriminate against them on grounds of race, sex, religion, handicap, or other statuses, or to harass them for such reasons.<sup>149</sup> Tort retrenchment challenges these increased protections for consumers, patients, and employees.

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award to \$480,000. AM. TRIAL LAWYERS ASS'N, *Press Room: McDonald's Scalding Coffee Case*, at [http://www.atla.org/ConsumerMediaResources/Tier3/press\\_room/FACTS/frivolous/McdonaldsCoffeecase.aspx](http://www.atla.org/ConsumerMediaResources/Tier3/press_room/FACTS/frivolous/McdonaldsCoffeecase.aspx) (visited Nov. 30, 2004).

149. Courts also granted increased rights to other groups in specific contexts. For example, an important series of decisions during the 1960's and 1970's transformed the landlord-tenant relationship. See, e.g., *Kline v. 1500 Mass.*

### 1. Product Liability

The transformation of product liability during the first 80 years of the 20th Century is well known and artfully described elsewhere, and will not be repeated here except to highlight major changes. The shortened version of the story is that at one time, the “privity” rule prevented injured persons from suing negligent manufacturers, unless they had a direct contractual relationship with the manufacturer. Therefore, consumers who purchased defectively manufactured automobiles from retailers could not sue the manufacturers directly—because they had no relationship with these manufacturers. In 1916, Judge Benjamin Cardozo famously abolished so-called “vertical” privity for products cases arising in New York, thereby permitting a purchaser in the direct line of sale to file suit against a negligent manufacturer.<sup>150</sup> But it was not until the 1960s that “horizontal” privity was abolished, allowing consumers or bystanders who were not directly in the retail distribution chain to bring similar suits.<sup>151</sup> This latter development profoundly increased

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Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970) (holding that a landlord had a duty to offer a reasonable level of protection to tenants from criminal attack); *Ramsay v. Morrisette*, 252 A.2d 509, 513 (D.C. 1969) (reversing summary judgment in favor of defendant-landlord and stating that, “modern urban living circumstances exist which may require that the landlord’s duty of reasonable care encompass steps to deter or prevent criminal acts against his tenant”). In addition, consumers who held insurance policies were permitted to sue in tort if insurance companies in bad faith refused to settle or to pay valid claims. *See, e.g., Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 179 (Cal. 1967) (permitting recovery in tort after an insurance company’s failure to settle a claim resulted in a judgment that exceeded plaintiff’s policy limits). Furthermore, courts imposed significant limitations on the capacity of business groups to avoid or limit these increased liabilities through contractual disclaimers or waivers. The most famous limitations occurred in the medical malpractice context, *e.g., Tunkel v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963), and in the context of products liability. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *see discussion infra* Part III.B.1.

150. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

151. *E.g., Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (allowing the wife of a purchaser of a car to recover from the automobile’s retailer and manufacturer for injuries sustained when the steering wheel failed, even though the wife was not in privity with either tortfeasor). Prosser described *Henningsen* as the fall of the citadel of privity. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791 (1966). Indeed, Prosser correctly forecast substantially increased

the incidence of products liability lawsuits, for now the privity bar preventing suit by anyone injured by a malfunctioning product—whether or not she purchased the product—was eventually lifted for relatives and neighbors, as well as bystanders.<sup>152</sup>

A parallel change in products liability cases, also stemming from major changes in tort law in the 1960s and early 1970s, likewise heralded stricter standards of liability for all those in the chain of products distribution. Beginning with Justice Traynor's famous opinion in *Greenman v. Yuba Power Products, Inc.*,<sup>153</sup> and buttressed by increased calls for manufacturers to internalize the costs of foreseeable and avoidable accidents,<sup>154</sup> courts began imposing variations of liability without fault on manufacturers who sold products containing manufacturing or design defects or inadequate warnings or instructions for their use.

Additionally, in a series of important opinions, leading courts began requiring product designers to take into account ergonomic realities, such as the frailties of potential users or the fact some users would not read detailed instructions.<sup>155</sup> In designing vehicles and other products that might be involved in accidents, manufacturers were required to consider, as a function of initial design, the likelihood that their products would be misused, that their human operators might make mistakes, or that their products might be exposed to other forces or events such as accidents. All of these requirements were controversial when rendered, but stemmed from a

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products liability lawsuits as a result of the spate of key cases that followed *Henningsen*. Subsequently, however, the importance of *Henningsen* as a lynchpin of product liability reform declined when the Restatement (Second) of Torts proposed that products liability be grounded in tort law (not breach of implied warranty, a contract law concept, as in *Henningsen*), and that liability be strict. See RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).

152. See, e.g., *Henningsen*, 161 A.2d at 100 (relatives); *Elmore v. American Motors Corp.*, 451 P.2d 84 (Cal. 1969) (permitting recovery for a plaintiff bystander injured by another plaintiff's defective car).

153. 377 P.2d 897 (Cal. 1963) (holding a manufacturer of a combination power tool strictly liable in tort for harm caused its defective product).

154. See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26–28, 39–67 (1970).

155. See *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997) (design defect); *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65 (Mass. 1985), *cert. denied*, 474 U.S. 920 (1985) (inadequate warning).

basic insight about the relationship between product design and social welfare: When manufacturers design products, they should take into account not only the functional purpose of the product, but also the nature of the users and the contexts in which their products might be used. The overarching goal was *to reduce the overall costs of accidents to the entire society*.<sup>156</sup>

Tort retrenchment increasingly targets this social function of tort law—forcing internalization of losses caused by avoidable product design defects—that emerged in judicial opinions and academic literature justifying these changes. Understanding the attack requires a brief explanation of the underlying economic theory.

In the 1960s and 1970s, progressive and conservative legal economists took up the question of how the economic and social costs of accidents in society could be reduced.<sup>157</sup> Both groups urged that the legal system should place losses caused by accidents in a fashion so as to incentivize a party who was in a position to do something about the accident to take steps to avoid such events in the future.<sup>158</sup> Oftentimes, the theory suggested that losses should be shifted to parties (such as manufacturers or major actors) who had the information, design capability, and resources to institute systemic changes.<sup>159</sup> Legal economists differed over the standard by which the liabilities should be shifted (for example, all agreed that not all losses should be shifted to actors, but they differed over whether the losses should be shifted only if negligently caused or under some higher standard), but most concurred with the general framework for allocating losses caused by accidents.

At issue, therefore, in recent debates over tort law, is whether a system that imposes the costs of accidents by locating the “least cost

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156. Guido Calabresi's *THE COSTS OF ACCIDENTS* expertly described the theory. See CALABRESI, *supra* note 154.

157. See, e.g., *id.* (discussing the goals of accident cost reduction and methods for achieving those goals); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–36 (1972) (exploring the hypothesis that negligence law is designed to bring about an efficient level of accidents and safety).

158. See CALABRESI, *supra* note 154, at 26–28.

159. *Id.* at 51; see also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (arguing that accident losses should be spread in a manner that results in proper allocation of resources).

avoider" should be eliminated. Business actors who, through redesign of their products or modification of their actions, could avoid or reduce such losses would obviously prefer not to internalize the costs of the losses. Avoiding liability, however, does not reduce the harm thus caused; it merely imposes the loss on some other party.

A famous case in the late 1970s captures the moral and economic force of the new product liability rules.<sup>160</sup> Ford Motor Company designed a new vehicle, the Pinto, but did not include several inexpensive devices that likely would have prevented gas tank explosions in the event of a rear end collision.<sup>161</sup> Ford's designers predicted that, over time, some Pinto drivers would be seriously injured or killed if Ford did not install the devices, but Ford concluded that these deaths and injuries did not justify the total expenditure that would be required if the safety devices were installed.<sup>162</sup> Richard Grimshaw, a passenger, was severely burned when the car in which he was riding was rear-ended.<sup>163</sup> Because of the implied tradeoff between passenger safety and profits, a jury held Ford liable and awarded \$2.5 million in compensatory damages and \$125 million in punitive damages.<sup>164</sup>

The theory of tort liability for defective products remains controversial within the business community, and in some academic circles.<sup>165</sup> The tort retrenchment movement taps into this dissatisfaction, urging that different standards of liability—or even immunities—be employed.

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160. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981).

161. *Id.* at 359–61.

162. *Id.* at 361–62.

163. *Id.* at 359.

164. The punitive damage award was reduced to \$3.5 million on appeal. *Id.* at 390–91.

165. *E.g.*, George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

## 2. Professional Negligence Actions Against Hospitals, Doctors, and Lawyers

Prior to the 1960s, few cases of malpractice were brought against doctors and other professionals.<sup>166</sup> Beginning in the 1970s, however, plaintiffs began suing doctors, hospitals, lawyers, and other professionals in greater numbers. Why the change? Was it because patients who at one time might have been satisfied with medical care suddenly became litigation-happy? Or did these professionals become less cautious than they were at one time? Or, because of the rapid changes in medical practice brought about by corporate health care, did patients no longer feel that physicians knew or cared about their individual circumstances?

Part of the answer may lie in three key changes that occurred in malpractice doctrine during the 1960s and 1970s: (1) the widespread abandonment of the locality rule in the 1970s; (2) the increasing willingness of state courts to accept testimony from medical and other professionals located outside the immediate geographical center of the litigation; and (3) the development of a major new negligence cause of action against medical professionals: lack of informed consent. We take up each of these developments in turn.

Prior to the 1970s, most jurisdictions followed a locality rule of medical practice, whereby medical practices that led to harmful consequences to patients were judged against the standard prevalent in the local community.<sup>167</sup> A concomitant rule held physicians to the skill level possessed by "physicians and surgeons of ordinary ability and skill"<sup>168</sup> within that community. The rationale behind these rules was that practitioners in small towns lacked opportunities to stay current with advances in medicine, and would not have the same modern facilities for treating patients.<sup>169</sup>

These locality rules were widely followed until the 1960s, when courts recognized that they would have the serious consequence of

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166. See Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 420-21 (1986). See also PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 60 (1985).

167. The history of the locality rule is explored in one of the leading cases rejecting the rule, *Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968).

168. *Id.* at 795.

169. See *id.* at 796.



enabling doctors in rural locales, or outside urban areas, to follow standards of care that might have been outdated or rejected in more progressive or modern medical centers. Indeed, one Massachusetts trial court instructed a jury that if the "ability and skill of the physician in New Bedford were fifty percent inferior to that which existed in Boston, a defendant in New Bedford would be required to measure up to the standard of skill and competence and ability that is ordinarily found by physicians in New Bedford."<sup>170</sup> Obviously, if the legal rule permitted medical practitioners to adhere to such inferior standards of practice, it would be very difficult for injured patients to prevail in malpractice actions against inferior—but locally accepted—medical practices.<sup>171</sup>

Because the locality rule established the standard of care in a particular community, in order to prevail an injured patient would ordinarily be required to offer expert testimony from other physicians in the community that the substandard care violated local practice and was therefore negligent. But, how would a patient obtain such testimony? Only from other doctors practicing in the same locality. Here is where the "conspiracy of silence" came into play. The local medical establishment, arm-in-arm with malpractice liability insurers, stigmatized and shunned any physician who dared testify against any other doctor.<sup>172</sup> Thus, the locality rule practically

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170. *Id.* at 795.

171. The locality rule was subjected to substantial academic criticism. See Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141, 1148 (1975) [hereinafter *Comparative Approaches*].

172. There were two features of the ostracism practiced against any doctor who dared testify against another medical professional. One was social and professional: other physicians in the area would refuse to have anything to do with the deviant doctor. The other had important implications for the practitioner's own medical practice: liability insurers often threatened to cancel policies on physicians who testified against other physicians in malpractice cases. For a review of these practices, see generally KOENIG & RUSTAD, *supra* note 64 at 13334 (describing the history of medical malpractice); see also *Huffman v. Lindquist*, 234 P.2d 34, 46 (Cal. 1951) (Carter, J., dissenting):

Anyone familiar with cases of this character knows that the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case . . . This is largely due to the pressure exerted by medical societies and public liability insurance companies . . . physicians who are members of medical societies flock to the defense of their fellow member charged with malpractice and the plaintiff is

barred most claims of medical malpractice, and the conspiracy of silence prevented worthy plaintiffs from obtaining necessary evidence even in egregious cases.

In the 1960s and 1970s, however, responding not only to the rise of a national market for medicine, but also to the intense criticism of the locality rule, most states overturned the locality rule.<sup>173</sup> Thus, patients with meritorious claims were no longer barred from court if they could establish—often with testimony from physicians from other states—that local medical practices embraced substandard care.<sup>174</sup>

The other major change in professional standards occurred with the development of a new doctrine of patient rights—requiring physicians both to inform their patients of the risks of proposed surgeries or treatments, and to obtain their explicit consent to such treatment. This doctrine of informed consent, spurred by leading opinions such as *Canterbury v. Spence*<sup>175</sup> in 1972, reflected a dramatic cultural shift in the society.

To simplify this impressive cultural shift, permit us to generalize. At one time a physician's judgment that a particular medical procedure was necessary for a patient's health was routinely deferred to on grounds that "doctor knows best." A North Carolina case from the 1950s illustrates the point. In *Kennedy v. Parrott*,<sup>176</sup> a female patient consented to an appendectomy. During surgery, the physician defendant noticed cysts on her ovaries, and punctured

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relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy.

Butts v. Watts, 290 S.W.2d 777, 779 (Ct. App. Ky. 1956) ("[t]he notorious unwillingness of members of the medical profession to testify against one another may impose an insuperable handicap upon a plaintiff who cannot obtain professional proof.").

173. See *Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968); see also *Comparative Approaches*, *supra* note 171, at 1149; DANZON, *supra* note 166, at 144.

174. See, e.g., *Buck v. St. Clair*, 702 P.2d 781, 783 (Idaho 1985) (establishing the rule that board-certified specialists from any region of the country may testify against other board-certified specialists practicing in the same area of medicine).

175. 464 F.2d 772 (D.C. Cir. 1972).

176. 90 S.E.2d 754 (N.C. 1956).

them.<sup>177</sup> Although the cysts did not create an emergency, the physician believed it was good practice and necessary for the patient's health that the cysts be punctured, but he did not seek her specific consent or that of a family member.<sup>178</sup> The puncturing, although performed without negligence, nevertheless led to phlebitis in her leg.<sup>179</sup> Addressing whether the physician was required to obtain the patient's consent before puncturing the cysts, the court held that

in major internal operations . . . consent . . . will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever *he, in the exercise of his sound professional judgment*, determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated. This rule applies when the patient is at the time incapable of giving consent, and no one with authority to consent for him is immediately available.<sup>180</sup>

Thus, the *physician's* judgment as to what was best for the patient was highlighted; the patient's own autonomy and right of self-determination was disregarded.<sup>181</sup>

In the 1960s, however, this quaint, paternalistic view was largely supplanted by a new doctrine of informed consent, requiring physicians not only to disclose the material risks and benefits of

177. *Id.* at 760.

178. *Id.*

179. *Id.* at 755.

180. *Id.* at 759 (emphasis added).

181. See, e.g., *Hunt v. Bradshaw*, 88 S.E.2d 762, 766 (N.C. 1955) ("It is understandable the surgeon wanted to reassure the patient so that he would not go to the operating room unduly apprehensive. Failure to explain the risks involved . . . may be considered a mistake . . . but under the facts cannot be deemed . . . to import liability."). See also Michael Justin Myers, *Informed Consent in Medical Malpractice*, 55 CAL. L. REV. 1396 (1967) (exploring the doctrine of informed consent as it existed in the mid-twentieth century and proposing a standard requiring full disclosure of material risks); Marc A. Rodwin, *Patient Accountability and Quality of Care: Lessons From Medical Consumerism and the Patients' Rights, Women's Health and Disability Rights Movements*, 20 AM. J. L. & MED. 147 (1994) (discussing attitudes towards patients' rights prior to the 1960s).

proposed treatment plans, but also to obtain their patient's *knowing* consent.<sup>182</sup> Grounded largely on the principle that patients should be able to determine what medical treatment is appropriate for themselves, the new rule led to increased litigation over whether physicians had adequately informed their patients of the hazards of particular procedures and obtained informed consent.<sup>183</sup>

The upshot of these three developments is that during the 1960s and 1970s, doctors and other medical practitioners began seeing an increase in malpractice lawsuits based either on substandard "local" medical procedures, or the failure of physicians to obtain their patients' informed consent. In turn, the early 1970s saw one of the first (of many) "malpractice insurance crises" wherein malpractice insurance rates increased dramatically.<sup>184</sup>

There is substantial dispute within the scholarly community about what prompted the malpractice insurance crisis of the early 1970s. Some argue that insurance companies manufactured the insurance crisis to justify dramatic premium hikes; others argue that the rate of medical malpractice claims did not rise significantly higher than the rate of population increase. Nonetheless, even assuming that *all* increased malpractice litigation stemmed from the changes in legal doctrine described in text, the real question is whether those doctrinal changes are appropriate, or should be rolled back. This is the issue that medical malpractice "reformers" prefer to ignore, and that defenders of the civil justice system have not sufficiently addressed.

### 3. Expansion of Employee Rights

In 1964, Congress enacted the Civil Rights Act of 1964 that forbade employment, housing, educational, or public accommodations discrimination on the basis of race, sex, national

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182. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *In re Swine Flu Immunization Products Liability Litigation*, 533 F. Supp. 567, 575-76 (D. Colo. 1980); Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 N.W. U. L. REV. 628, 639-40 (1970).

183. See, e.g., *Canterbury*, 464 F.2d at 781; *Natanson v. Kline*, 354 P.2d 670, 672-73 (Kan. 1960); *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P.2d 170 (Cal. Dist. Ct. App. 1957).

184. DANZON, *supra* note 166, at 60.

origin, or religion.<sup>185</sup> The worker protections were eventually extended to bar discrimination based on handicap and age.<sup>186</sup> Fought vehemently by business and industry, these prohibitions eventually became the subject of intense litigation in federal courts. Whereas few claims of employment discrimination had been filed by 1970, by 1980 employment discrimination cases were one of the most important categories of federal court litigation.<sup>187</sup> This new legislation created an entirely new body of statutory torts, the contours of which were developed in the crucible of highly controversial litigation, often with business groups attempting to restrict the scope of the statutory protections. Indeed, after several circuit and Supreme Court decisions appeared to cut back on the reach of these statutory torts, Congress enacted several statutes in the 1990s that restored and expanded these rights.<sup>188</sup>

One of the new claims stemming from Title VII's prohibition on sex discrimination eventually came to dominate national discussion on gender relations: the prohibition on sex harassment. Although not developed as a separate discrimination action until the late 1970s and 1980s, the prohibition on sex harassment in the workplace is now well established in civil rights jurisprudence.<sup>189</sup> These protections, however, come at a cost: as business groups repeatedly point out, the cost of employment litigation has skyrocketed, and liability insurance premiums correspondingly have increased.<sup>190</sup>

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185. 42 U.S.C. §§ 2000e-2000e-17 (2001) (Equal Employment Opportunities).

186. 3 U.S.C. § 411(a) (2000).

187. See John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984-85 (1991) (explaining that while the general federal civil caseload grew 125% between 1979 and 1989, the employment discrimination caseload grew 2166%).

188. See, e.g., the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (creating jury trials for damage actions in employment discrimination lawsuits).

189. E.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

190. The amount of monetary payments paid out as a result of employment litigation reached a high of \$148 million in 2003. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC LITIGATION STATISTICS, FY 1992 THROUGH FY 2003, at <http://www.eeoc.gov/stats/litigation.html>; *Tillinghast-Towers Perrin, 2002 Directors and Officers Liability Survey—Executive Summary of U.S. and Canadian Results*, at <http://>

The goal announced by Congress—to reduce fundamental racial and gender inequalities in the system<sup>191</sup>—cannot be achieved without litigation. Congress recognized that the resources of private attorneys would be necessary in order to achieve the goal of a discrimination-free society. Seeking to marshal the energies of private attorneys, Congress enacted fee-shifting statutes that enabled successful claimants to recoup the monies paid to their lawyers or that public-minded lawyers could recover even if their clients were penurious.<sup>192</sup>

In 1968, the Supreme Court famously heralded this new era, proclaiming that private attorneys bringing civil rights lawsuits were acting as “private attorneys general”<sup>193</sup> in both shaping the law and seeking redress for injured persons. Fighting and remedying discrimination based on race, sex, age, religion, national origin, and eventually disability became public policy. But all this litigation has a cost: the volume of litigation increases, and institutional defendants expend resources fighting the charges. Insurance against

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[www.towersperrin.com/tillinghast/publications/report/Directors\\_and\\_Officers\\_2002/DO\\_summary2002a.pdf](http://www.towersperrin.com/tillinghast/publications/report/Directors_and_Officers_2002/DO_summary2002a.pdf), at 5, 7–8 (describing increase in liability premiums and number of employment discrimination claims as a proportion of total claims against employers); see also Wade Lambert, *Firms' Legal Costs Rose 18% in '93 Despite Efforts to Curb Expenses*, WALL ST. J., July 6, 1994, at B8, 1994 WL-WSJ 333564.

191. Civil Rights Act of 1964, 42 U.S.C. §§2000e–2000e-17 (2001).

192. See *id.* § 2000e-5(k) (2000); see also *id.* § 1988.

193. *Newman v. Piggie Park Enters, Inc.*, 390 U.S. 400, 401–02 (1968) (*per curiam*).

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

*Id.*

discrimination lawsuits increases, and money is put aside to both remedy the legitimate complaints and to fight those believed faulty.<sup>194</sup>

Is it worth the increased liability premiums? Is the dramatic increase in litigation as a result of enactment of the civil rights laws in the 1960s worth the administrative cost of enforcement? The answer is yes, if the society is to remain committed to principles of anti-discrimination. It is "worth it" since rooting out discrimination "root and branch"<sup>195</sup> can only be achieved case by case, issue by issue, institution by institution.

Tort retrenchment implicitly challenges anti-discrimination law when it complains of "too many suits" and increasing costs of litigation and liability premiums. Defenders of the civil justice system need to make explicit what is presently implicit: tort retrenchment arguments undermine anti-discrimination law.

### *C. Expansion of Duties to Protect Others*

Another major development in tort law during the last half of the 20th century concerns new duties imposed on some actors to protect others from harm caused by foreseeable events that the actors did not themselves create. In general, such duties owed to others reflect an attempt to mediate the tension between an individual's desire for autonomy and the community's need for individuals to look out

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194. In addition to the creation of new anti-discrimination rights, many states also imposed public policy limitations on the "at will" doctrine—which granted employers the plenary power to hire and fire their employees. *E.g.*, *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959). *See generally*, Comment, *Guidelines for a Public Policy Exception to the Employment At Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617 (1981) (explaining scope of public policy exception); Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981) (examining the reach of the public policy exception); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) (calling for broader application of the public policy exception).

195. *Green v. County School Bd.*, 391 U.S. 430, 437–38 (1968) ("School boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch*." ) (emphasis added).

for others. These newer duties nudged the point on the autonomy/community continuum towards the “community” pole.

One group of new duties breached the wall of individualism—a view that people do not have to help others in need in the absence of an explicit agreement to do so. This new set of duties required individuals to assist vulnerable “others.” These new duties should be understood in general as exceptions to the standard line in torts texts that one does not have a general duty to aid another in need. Indeed, the so-called rule of “no duty” has been eroded by many decisions.

One class of exceptions concerns “special relationships,” where there is a relationship between the plaintiff and the defendant, or between the defendant and someone who caused injury. *Tarasoff v. Regents of the University of California*<sup>196</sup> provides a common illustration. In *Tarasoff*, a patient told his psychiatrist that he intended to kill his girlfriend.<sup>197</sup> The psychiatrist did nothing to warn the girl, and the patient killed her.<sup>198</sup> The court held that the psychiatrist had a duty to warn the girl, or to take reasonable steps to protect her from his patient.<sup>199</sup> Similar duties have been imposed on other medical professionals who have reason to know of a patient’s propensity to injure another.<sup>200</sup>

The class of special relationships has been extended to many other contexts: landlords owe a duty to protect their tenants from criminal acts by intruders;<sup>201</sup> businesses owe a duty to protect

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196. 17 Cal. 3d 425 (1976).

197. *Id.* at 432.

198. *Id.* at 433.

199. *Id.* at 450.

200. See Fillmore Buckner & Marvin Firestone, “Where the Public Peril Begins” 25 Years After *Tarasoff*, 21 J. Legal Med. 187, 202 (2000) (“There has been a continuum of cases based on [*Tarasoff*’s] precedent that have promulgated a broad duty for health care practitioners to protect the general public from foreseeable harm.”). The *Tarasoff* duty has been extended in some circumstances beyond even the realm of the field of health care. See, e.g., *Mostert v. CBL & Assocs.*, 741 P.2d 1090 (Wyo. 1987) (holding that a movie theatre complex had a duty to warn patrons of the off-premises danger of severe weather after the patrons’ seven year old daughter drowned in an attempt to escape her parents’ car when a flash flood hit the complex’ parking lot).

201. *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (permitting a tenant to recover after being assaulted and robbed in a common area of her apartment building).



customers on their premises from foreseeable criminal acts;<sup>202</sup> educational institutions owe a duty to protect their students from foreseeable criminal assaults;<sup>203</sup> and common carriers such as bus and train operators owe their passengers similar duties.<sup>204</sup>

A second example of expanding duties relates to torts in sports. In the 1970s, courts tended to see injuries occurring during sporting events as risks "assumed" by the participants, even though the injuries might have been deliberately or maliciously inflicted. This began to change when courts were faced with the choice between turning away from deliberate injuries inflicted outside the bounds of the game, or creating a standard that imposed some duty of care on participants not willfully to injure other participants.

The change in Massachusetts state law is instructive. In *Gauvin v. Clark*,<sup>205</sup> during a hockey match the defendant Clark "butt-ended" his hockey stick into Gauvin's abdomen in violation of safety rules.<sup>206</sup> Ordinarily, such an infraction results in a major penalty and disqualification from the game.<sup>207</sup> Gauvin was hospitalized and required surgery.<sup>208</sup> The question was what standard of care—if any—players in sporting events were required to exercise for other players' safety. The court adopted a recklessness standard:

The problem of imposing a duty of care on participants in a sports competition is a difficult one. Players, when they engage in sport, agree to undergo some physical contacts which could amount to assault and battery absent the

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202. *Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286, 293 (Wash. 1997) (holding that a business has a duty to protect patrons from "imminent criminal harm and reasonably foreseeable criminal conduct by third persons"). The court found that the defendant store had a duty to protect a customer who was assaulted by a group of loitering teenagers as he approached the store's entrance. *Id.* at 287.

203. *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193, 1201-02 (Cal. 1984) (finding a school liable for failing to warn a student who was assaulted on campus in an area where similar attacks had taken place).

204. *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 914 (Cal. 1985) (holding that a publicly-owned, common carrier could be liable to passenger for injuries sustained in an on-board fight).

205. *Gauvin v. Clark*, 537 N.E.2d 94 (Mass. 1989).

206. *Id.* at 95.

207. *Id.* at 96.

208. *Id.* at 95.

players' consent. The courts are wary of imposing wide tort liability on sports participants, lest the law chill the vigor of athletic competition. Nevertheless, some of the restraints of civilization must accompany every athlete on to the playing field. "[R]easonable controls should exist to protect the players and the game."

The majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety.

We adopt this standard. Allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games. Precluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that "[v]igorous and active participation in sporting events should not be chilled by the threat of litigation."<sup>209</sup>

Decisions like *Gauvin* have been criticized on grounds that any participant in a sporting event injured by another player now has an incentive to sue the player (or the coach, school, or league) for his injuries.<sup>210</sup> Yet should participants be able deliberately to inflict serious bodily injury on their opponents in a way that is not only reckless, but violates safety rules of the sport? This is the question raised by tort retrenchment.

A final example concerns the development of comparative fault. The advent of comparative fault in the early 1970s transformed much of personal injury litigation for the last quarter of the 20th century. Comparative negligence supplanted the absolute defense of

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209. *Id.* at 96–97 (citations omitted).

210. See, e.g., Stuart Taylor, Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 42 (cover story) (criticizing "increased" litigiousness among Americans, including lawsuits by amateur sports participants against their non-profit leagues), <http://msnbc.msn.com/id/3660738/site/newsweek> (last visited Aug. 1, 2005); Pete Eshelman, *Pass bill limiting suits against sports groups*, FT. WAYNE J. GAZETTE (IND.), Nov. 20, 2004, at 7A, 2004 WL 98778140; Simon Gardiner & Alexandra Felix, *Juridification of the Football Field: Strategies for Giving Law the Elbow*, 5 MARQ. SPORTS L.J. 189 (1995) (criticizing the increasing involvement of law in the regulation of on-the-field behavior in England).

contributory negligence, so that where once plaintiffs' momentary inattention or modest carelessness towards their own safety completely barred them from suit, now they could recover for their injuries, minus the proportion of damages for which they could justly be held individually responsible. Comparative fault principles swept the legal system during the 1970s so that, by the early 1980s, only a handful of jurisdictions retained the total bar of contributory negligence.<sup>211</sup>

The advent of comparative fault transformed the civil litigation system. Lawyers who previously would reject cases of serious injury caused by culpable defendants, but where victims had contributed in some small way to their own injuries, could now bring such cases knowing that an equitable division of damages would likely result in favorable damage awards. Indeed, to the extent that there was an increase in personal injury filings in the 1970s and 1980s over previous decades, it is logical to believe that some significant part of the increase was directly attributable to the rise of comparative fault.

#### *D. Recognizing Emotional Harm as a Significant and Compensable Loss*

Early tort law forbade any recovery for mental or emotional harm unless it was the direct result of a recognized tort. In 1948, the Restatement (Second) of Torts section 46 recognized infliction of emotional distress as an independent tort, although some states have been reluctant to adopt that view.<sup>212</sup> The legal system increasingly acknowledged the reality of emotional harm as a distinct and compensable injury in the latter half of the 20th century. Medical developments in the field of mental health and societal recognition of the effects of emotional harm have contributed to expanded opportunities for recovery.

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211. In 1975, in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804 (1975), the California Supreme Court abolished the total bar rule of contributory negligence in favor of comparative fault. By 1988, forty-four states had overturned the total bar rule of contributory negligence in favor of comparative fault. See KOENIG & RUSTAD, *supra* note 64, at 52. For the early history of comparative fault, see Thomas F. Lambert, Jr., *The Common Law is Never Finished (Comparative Negligence on the March)*, 32 AM. TRIAL LAW. J. 741 (1968).

212. See *Malik v. Carrier Corp.*, 986 F. Supp. 86, 90 (D. Conn. 1997), *rev'd in part*, 202 F.3d 97 (2d Cir. 2000).

By the late 19th and early 20th centuries, the fields of medicine and psychology had amassed significant research establishing that emotional disturbances were, as a matter of fact, a mixture of physical and mental manifestations.<sup>213</sup> As a matter of law, however, the legal field was slower to adopt the view that emotional pain and suffering were objective phenomena worthy of protection.<sup>214</sup> The following statement summarizes the general consensus pervading the profession in the mid-19th century: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."<sup>215</sup> For many years, this oft-quoted dicta by Lord Wensleydale in *Lynch v. Knight* served as an obstacle to allowing recovery for mental harm and acted as a "blindfold,"<sup>216</sup>

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213. See, e.g., GEORGE W. CRILE, *THE ORIGIN AND NATURE OF THE EMOTIONS* 93 (Amy F. Rowland ed., McGrath Publishing Company 1970) (1915) ("The fact that emotion is more injurious to the body than is muscular action is well known."); Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 498 (1922) (describing the work of Drs. Walter B. Cannon and George W. Crile, whose research established strong connections between emotions and the physical body); see also Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426, 426 ("It is true, of course, that all emotional disturbances are at the same time physiological so that the distinction between emotional distress and physical harm, as usually drawn by the courts, may not be strictly scientific.").

214. Herbert Goodrich was one of the first legal scholars to acknowledge the significant strides made in the health field with respect to documenting the visceral effects of fear and other emotions, such as grief, worry, and anxiety ("It would, I believe, help us in solving legal problems arising from claims for damages arising through emotional disturbance . . . if we kept ourselves familiar . . . with what medical men and psychologists are finding out about emotion and its effect on the human body."). Goodrich, *supra* note 214, at 497. For an early case leading toward this acknowledgement, see *Dulieu v. White*, 2 K.B. 669, 677 (1901), in which Justice Kennedy notes the judiciary's growing perception that medical professionals were on the verge of confirming that nervous shock is or may be injurious to the physical body. But see Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 266 (1922) ("The mere temporary emotion of fright not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action.").

215. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1033 (1936) (quoting *Lynch v. Knight*, 9 H.L. Cas. 577, 598 (1861)).

216. J.L. Borda, *One's Right to Enjoy Mental Peace and Tranquility*, 28 GEO. L.J. 55, 59 (1939).

couching mental pain as "something too elusive for the hardheaded workaday common law to handle."<sup>217</sup> Common objections to providing redress for mental harm included evidentiary obstacles, the risk posed to innocent defendants who might be subject to the whims of emotionally upset or unstable people, the possibility of fraudulent litigation, and the difficulty of assessing damages.<sup>218</sup>

Yet, with the advent of the 20th century, the work of Drs. Cannon and Crile, among others, influenced both legal scholars and judges to the extent that by 1939, Prosser had identified at least a dozen cases in which the right to be free from mental suffering was the only interest for which recovery was granted.<sup>219</sup> The field of law, and torts in particular, was undergoing a reexamination of traditional rules in light of scientific progress.<sup>220</sup> Skeptics' criticisms were allayed in part by Dr. Crile's work, which convinced many that the expertise of surgeons and physiologists would protect against fraudulent claims and keep courts posted as to further research developments.<sup>221</sup>

Indeed, legal acknowledgement that emotions have a physical impact rising to the level of "harm to the organism"<sup>222</sup> and that such harm is measurable<sup>223</sup> seemed to follow years of juries feeling

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217. Goodrich, *supra* note 213, at 497.

218. See Borda, *supra* note 216, at 58.

219. See William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 886-87 (1939). Prosser noted that the emerging rule seemed to be to allow recovery only for conduct "exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause mental damage of a very serious kind." *Id.* at 889. But see Magruder, *supra* note 215, at 1035 ("Quite apart from the question how far peace of mind is a good thing in itself, it would be quixotic indeed for the law to attempt a general securing of it . . . [A] certain toughening of the mental hide is a better protection than the law could ever be."). Note that Magruder nevertheless recognized the logic in extending a legal remedy to plaintiffs who experienced severe emotional disturbance as a result of a defendant's conduct that exceeded all bounds of decency. *Id.* at 1058-59.

220. See Lawrence Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222, 228 (1939).

221. See Borda, *supra* note 216, at 59.

222. Goodrich, *supra* note 213, at 501.

223. *Id.* Goodrich wisely points out that the inquiry does not end at asking whether emotions have a physical impact; rather, relevant to the law is whether that physical impact causes harm that is measurable. By distinguishing between mere emotions and pain or suffering, Goodrich was able to conclude

compelled to award plaintiffs compensation for their emotional pain and suffering, "whether they should do so or not."<sup>224</sup> In this way, legal recognition of the individual's interest in freedom from mental injury arose from a combination of scientific findings seeping into legal scholarship, and long-standing societal beliefs that the effects of experiencing emotional grief, worry, or anxiety often far outweigh the physical struggle associated with injury.<sup>225</sup> In essence, judges and juries came to rely on modern standards to strike "the proper balance between individualism and the price one must pay to take part in society," especially considering "modern conditions of high speed living, and . . . standards of propriety, good taste and decency."<sup>226</sup> Despite these advances in legal doctrine, plaintiffs still needed to demonstrate some sort of physical impact stemming from their emotional harm in order to recover.<sup>227</sup>

The next step in the legal transformation that brought mental harm into the realm of legally compensable injury was refining the element of damages. As the hurdle to proving pain and suffering

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that since the physical effect of strong emotional impact can constitute harm that is both detectable and measurable, "the plaintiff's right to recover for such disturbance should be recognized." *Id.* at 503.

224. *Id.* at 509. Goodrich explains that courts who opined that recovery for mental suffering not be permitted were the same courts that actually granted such relief, and also that juries awarded damages for emotional anguish "at a time when courts were not able to force their conceptions of legal injuries on juries. . . the jury always will include it, whether they should do so or not." *Id.* See also Borda, *supra* note 216, at 56 ("It is now evident that the jurists feel they should afford protection to one's mental and emotional well being and the pendulum is swinging in the direction of a more liberal doctrine with respect to this phase of the law."); Magruder, *supra* note 215, at 1034 (noting and chronicling cases throughout history in which significant damages were awarded to plaintiffs experiencing humiliation and mental suffering).

225. For a perspective on the gender differentiation that developed in the historical treatment of emotional injuries, particularly fright-based harm, see Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

226. Borda, *supra* note 216, at 58, (referencing the discussion in Harper & McNeely, *supra* note 213, at 456, 464).

227. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 350-51 (3d ed.) ("'Impact' has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. The requirement has been satisfied by a fall brought about by a faint after a collision, or the plaintiff's own wrenching of her shoulder in reaction to the fright. . .").

became easier to surmount, the greater difficulty resided in arriving at a standard for measuring this type of damage.<sup>228</sup> In early cases such as those cited by Magruder, juries were apt to award significant damages for mental suffering, albeit parasitic at that time to the invasion of other legally protected interests.<sup>229</sup> Historically, monetary compensation was recognized as the only practical method of redress that the legal system could offer.<sup>230</sup> Juries seemed to respond to this concept, and in particular to the idea that intentional infliction of emotional distress was socially unacceptable.<sup>231</sup> Prosser also recognized the familiarity of emotional disturbance as an element of compensable damages, as well as its admittedly difficult measurement.<sup>232</sup> Despite the recognized dilemma of measurement, juries have long awarded significant damages for pain and suffering, even for short periods of disturbance.<sup>233</sup> In this way, legal doctrine merely followed the growing sentiment of a public that respected the right to be free from emotional distress.

Following this widespread recognition of mental suffering as a compensable loss, criticism began to surface with respect to the extent to which such damages should be awarded, and according to what standards.<sup>234</sup> The effort to "rein in" juries to ensure a reasonable award of damages is not a recent development in tort law. For example, in the 1950s considerable debate and analysis was expended over jury instructions for awarding damages for future pain and suffering.<sup>235</sup> In a number of cases, juries were allowed to rely

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228. See, e.g., Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 203 (1958).

229. See Magruder, *supra* note 215, at 1035.

230. See Vold, *supra* note 220, at 231.

231. *Id.* at 237 n.80, citing Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 5-6 (1895) ("There is no general policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm.").

232. William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 43 (1956) (noting, however, "the admitted difficulty of measuring its financial equivalent never has been regarded as an insuperable obstacle").

233. See, e.g., Plant, *supra* note 228, at 200-01, citing *Miller v. S. Pac. Co.*, 256 P.2d 603 (Cal. Ct. App. 1953) (\$20,000 awarded for twenty minutes of pain) and *Norton v. Phillips Petroleum Co.*, 28 N.Y.S.2d 579 (App. Div. 1941) (\$5,000 awarded for two hours of suffering).

234. See *id.*

235. See *id.* at 202.

solely on the plaintiffs' own testimony as to subjective symptoms of pain and suffering.<sup>236</sup> Sedgwick (and other legal scholars) noted as early as 1912 that, "For pain and suffering . . . there can be no measure of compensation save the arbitrary judgment of a jury."<sup>237</sup> Cases in the mid-twentieth century continued to reflect this uncertain standard.<sup>238</sup> Yet courts also recognized that pain and suffering is an individual phenomenon, likely to differ from one plaintiff to the next.<sup>239</sup> Even in the 1950s, judges frequently reduced the amounts of pain and suffering damages awarded by juries.<sup>240</sup> Despite the uncertainty associated with pain and suffering awards, however, the final verdict was believed to reflect a just amount in a majority of cases.<sup>241</sup>

In the 1960s, new developments in medical research tended to dispel the previously held specificity theory of pain in favor of one that viewed pain as influenced by social and interpersonal factors.<sup>242</sup> Legal scholars reviewing these medical developments asserted that these new views of pain "pose obvious and direct challenges to the physiological basis of pain that tort law seems to assume."<sup>243</sup> Thus, scientific evidence suggested that pain depends on more than just

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236. *Id.* at 204.

237. 1 SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 171 (9th ed. 1912).

238. *See* Plant, *supra* note 228, at 205 n.40.

239. *Id.* at 206.

240. *See id.* at 209 (discussing jury verdict reductions in *Musgrave v. Kitchen*, 157 N.Y.S.2d 237 (1956); *Lange v. Kan. City S. Ry. Co.*, 290 S.W.2d 71 (Mo. 1956); *Darnold v. Voges*, 143 Cal. App. 2d 230, 300 P.2d 255 (1956); and *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953)).

241. *Id.* at 210–11 (Plant goes on to propose limits on pain and suffering awards as a way to lend certainty to the process; however, instead of recommending the modern reform calls for damage caps, Plant thought limiting pain and suffering awards to a percentage of compensatory damages would be reasonable, though admittedly arbitrary.).

242. The specificity theory of pain believed pain to follow directly from a physical stimulus, whereas concepts such as psychogenic pain asserted that individuals might experience pain that does not originate from either organic or physiological bases, but rather from psychosocial factors. *See, e.g.,* Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355, 1355–61 (1974).

243. *Id.* at 1367. Peck suggests that a tortfeasor should not necessarily be held to compensate for a claimant's pain if social and psychological factors in addition to the defendant's action could have contributed to that pain. *Id.*



contact with an external stimulus, such as that caused by a defendant's tortious conduct. Legal commentators noted that due to the overriding social goal of allocating risks and resources in the most efficient manner possible, however, the possibility that additional factors not attributed to the tortfeasor could in part cause the plaintiff's pain should not relieve the defendant of liability.<sup>244</sup>

A number of rules were developed to limit or to channel compensation for emotional injury. The so-called "impact rule" operated to limit recovery for fright-based and other independent emotional injuries until the late 1960s.<sup>245</sup> At that time, many jurisdictions began to abolish the impact rule, but retained a derivation of it in the physical injury rule.<sup>246</sup> The "bystander rule" also developed as a mechanism to limit recovery for mental distress negligently inflicted on individuals not physically impacted by an event.<sup>247</sup> The physical impact and bystander rules have been relaxed in some states in the last few decades, but persist in many jurisdictions today.<sup>248</sup>

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244. *Id.* at 1368.

245. *See* Chamallas & Kerber, *supra* note 225, at 819. The impact rule required the plaintiff to have experienced some form of physical contact to state a valid claim. *Id.*

246. *Id.* at 820-21. The physical injury or impact rule required the plaintiff to prove that his or her mental distress resulted in physical injury. *Id.* at 81920. As of 1990, only a minority of states had abandoned this rule. For a representative case, see *Daley v. LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970), where the Michigan court stated, "[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff . . . may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock."

247. Chamallas & Kerber, *supra* note 225, at 821. The bystander rule dictates that a claimant show that his injury is traceable to fear for his own safety, rather than for fear of another's safety. *Id.* Many jurisdictions have extended this doctrine to allow recovery if the plaintiff experienced fear for another's safety so long as the plaintiff's own safety was threatened. *See, e.g.,* *Dillon v. Legg*, 441 P.2d 912 (1968) (permitting a bystander-child to recover even though the child was not physically injured); *see also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 361-67 (5th ed. 1984); Chamallas & Kerber, *supra* note 225, at 821-22 (1990) (describing the common law's gradual allowance of recovery for plaintiffs who feared for another's safety).

248. *See, e.g.,* Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and*

By 1970 many jurisdictions were routinely permitting recovery for emotional distress when accompanied by physical impact to the person (or a similar standard), or where the emotional distress itself led to physical manifestations of injury. Still, many jurisdictions were reluctant to recognize an independent *tort* in which negligence caused *only* emotional harm. In 1970, a Hawaii case paved the way for unprecedented recovery for negligent infliction of emotional distress (NIED) absent a physical manifestation of emotional distress.<sup>249</sup>

The adoption by some jurisdictions, and reluctant rejection by others, of recovery for NIED absent physical injury raises the question of what sparked this development in the law. One clue is that much of the judicial discussion on whether to allow NIED claims centers around cases in which plaintiffs sought recovery for emotional distress resulting from fear of contracting disease.<sup>250</sup> These claims coincided with the period in which widespread and large-scale social harms were being litigated through the civil justice system.<sup>251</sup> Thus, as litigation made mainstream society aware of social issues such as cancer resulting from asbestos exposure and dangers posed by the release of harmful toxins into the environment,

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*"Fear of Disease" Cases*, 28 TORT & INS. L.J. 1 (1992) (discussing the differing requirements to recover for negligent infliction of emotional distress (NIED) by looking at case law from all fifty states). As of 1992, thirty-six states and the District of Columbia required physical injury to recover for NIED (including "fear of disease" cases), while fourteen states rejected that requirement. See *id.* at 1. Marrs presents an excellent summary of the general principles underlying recovery for NIED absent physical injury.

A seminal case was *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (abolishing the physical impact rule in California), in which a mother witnessed her child being hit by a negligently driven vehicle. The California judiciary shifted the foreseeability requirement from foreseeability of impact to foreseeability of fright, thereby taking into account such factors as familial relationships, and refusing to treat the mother as just another bystander-witness.

249. See Narbeh Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J.L. & MED. 401, 408 (2000) (citing *Rodrigues v. Hawaii*, 472 P.2d 509, 520 (Haw. 1970), in which the Hawaii court adopted a "reasonable man" standard to determine a finding of serious mental stress).

250. See, e.g., Marrs, *supra* note 248, at 2-4.

251. See *supra* Part III.A.

individuals were armed with the knowledge that they might be at risk for developing serious physical illness.<sup>252</sup>

Jurisdictions that adopted the modern trend of allowing recovery for NIED absent physical injury did so out of general concern that requiring physical manifestation of emotional distress was both "underconclusive and overconclusive," allowing recovery where perhaps trivial emotional distress manifested itself physically, and barring recovery in other instances of "hidden" yet severe mental disturbance.<sup>253</sup> Some states focused on the fact that the goal of avoiding fraudulent claims could still be maintained, even in the absence of physical injury, since medical experts could testify as to whether a plaintiff was experiencing diagnosable distress.<sup>254</sup>

The impact of mental illness on society, both in terms of health status and economic productivity, is vast. Significantly, major depression is the leading cause of disability (measured by the number of years lived with a disabling condition) worldwide among persons age five and older, with schizophrenia and bipolar disorder among the top ten causes of lost years of healthy life for women in established market economies.<sup>255</sup> In the United States, one in five adults suffers from a diagnosable mental disorder in a given year.<sup>256</sup>

Historically, mental disorders have been stigmatized. Surveys conducted in the 1950s and administered again in the 1970s and 1990s reveal that the public's understanding of mental illness has

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252. Many of the early "fear of disease" cases, for example, involved workers who had known exposure to asbestos but who had yet to develop the cancer associated with such exposure.

253. Bagdasarian, *supra* note 249, at 412; *see also* Marrs, *supra* note 248, at 9–10.

254. *See* Bagdasarian, *supra* note 249, at 414–15 (discussing the approaches in Missouri, Montana, New Jersey, and Oregon). Bagdasarian advocates for the physical manifestation requirement, but proposes that the test adopt the principles underlying the field of psychosomatic medicine.

255. World Health Organization, Harvard School of Public Health, and World Bank, *Summary: The Global Burden of Disease* (Christopher J.L. Murray & Alan D. Lopez eds., 2001), <http://www.who.int/msa/mnh/ems/dalys/intro.htm>.

256. National Institute of Mental Health, *The Numbers Count: Mental Disorders in America* (2001), <http://www.nimh.nih.gov/publicat/numbers.cfm> (visited Nov. 18, 2004).

grown considerably over the last fifty years.<sup>257</sup> No longer characterized broadly as “lunatics,” those suffering from mental disorders are for the most part integrated into everyday society.<sup>258</sup> Seeking care for mental conditions has become more common. (Even one of cable television’s mafia leaders, Tony Soprano, regularly sees a therapist.) Whereas in the 1950s, people had difficulty distinguishing mental disorders from ordinary unhappiness, a 1996 survey revealed a public with a greater scientific understanding of mental illness, although the social stigma persisted.<sup>259</sup>

A poignant example of an emotional harm that has long existed, but that only in recent decades has become widely recognized and treated, is post-traumatic stress disorder (PTSD), first introduced into the psychiatric nomenclature in 1980.<sup>260</sup> While the study of PTSD originated around veteran populations, research has since revealed that the disorder is influenced by cultural and gender factors, but does not discriminate with respect to age, sex, or socioeconomic status.<sup>261</sup> In fact, a 1995 study of the U.S. civilian population estimated that 5% of men and 10% of women will experience PTSD at some point during their lifetimes.<sup>262</sup> In the days and weeks following exposure to a traumatic, stressful event, data suggests that 8% of men and 20% of women will go on to develop PTSD, with 30% of these individuals developing a chronic condition lasting for the remainder of their lifetimes.<sup>263</sup> The relationship between PTSD and the law has been noted; in particular, “[t]he PTSD diagnosis represents landmark recognition that an external event can serve as

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257. *Mental Health: A Report of the Surgeon General* 7–8 (1999), <http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c1.pdf> (visited Jan. 21, 2005).

258. *Id.* at 6–7 (describing the move away from institutionalization).

259. *See id.* at 8–9.

260. *See* Roger K. Pitman & Landy F. Sparr, *PTSD and the Law*, 9 NAT’L CENTER FOR POST-TRAUMATIC STRESS DISORDER RES. Q., Spring 1998, at 1.

261. *See* National Center for Post-Traumatic Stress Disorder, *What is Posttraumatic Stress Disorder?*, at [http://www.ncptsd.org/facts/general/fs\\_what\\_is\\_ptsd.html](http://www.ncptsd.org/facts/general/fs_what_is_ptsd.html).

262. *Id.*

263. *Id.*

the direct cause of a mental disorder," thus satisfying the causation element of a tort.<sup>264</sup>

For better or worse, the number of mental stress claims by employees under workers' compensation increased almost 800% between 1979 and 1990.<sup>265</sup> PTSD, like many mental disorders, has certain risk factors associated with the condition that may have implications for its recognition in the civil justice system. In particular, a history of exposure prior to the causative event (for example, a prior assault), family instability, gender (women are believed to be at twice the risk for PTSD than men), lower educational and income levels, and perhaps ethnicity have been shown to impact one's risk for PTSD.<sup>266</sup> Moreover, results from the National Women's Study<sup>267</sup> also demonstrate that the current and lifetime risk of being diagnosed with PTSD is significantly higher among victims of sexual harassment.<sup>268</sup>

Increased recognition of psychic injury undoubtedly underlies a significant part of increasing awards for pain and suffering damages. As society has awakened to the social impact of mental and emotional injuries, juries—reflecting a greater community awareness of the impact of these injuries—have in recent years been more willing to award damages for psychic injury. This is the debate that must be engaged: Should society recognize and compensate emotional harm? Or should we require that psychic injury be buried in our communities without recompense?

#### *E. Dramatic Increase in Business-vs.-Business Tort Litigation*

One of the unheralded developments in civil litigation during the last thirty years has been a dramatic increase in business-against-

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264. Pitman & Sparr, *supra* note 260, at 1.

265. *Id.*, citing J.C. Decarteret, *Occupational Stress Claims: Effects on Workers' Compensation*, 42 AM. ASS'N OF OCCUPATIONAL NURSES HEALTH J. 494, 494-98 (1994)).

266. See Sarah L. Halligan & Rachel Yehuda, *Risk Factors for PTSD*, 11 NAT'L CENTER FOR POST-TRAUMATIC STRESS DISORDER RES. Q., Summer 2000, at 1.

267. See Amy E. Street et al., *Sexual Harassment*, 14 NAT'L CENTER FOR POST-TRAUMATIC STRESS DISORDER RES. Q., Winter 2003, at 2.

268. See *id.* at 1.

business tort litigation. Business tort litigation has jumped so dramatically that it can fairly be said that much of the increase in civil litigation occurring during the past thirty years can be attributable to two things: the "social" litigation referred to above, and a dramatic increase in the instances of businesses suing other businesses.

The volume of business litigation mushroomed in the late 1960s and early 1970s. Moreover, this litigation was not characterized by individuals suing businesses, but by businesses suing businesses. Businesses were now using the legal process as one more tool in the business planning process.<sup>269</sup>

According to the *Wall Street Journal*, businesses suing businesses over contract disputes comprised nearly half of all federal court cases filed between 1985 and 1991.<sup>270</sup> Professors Marc Galanter and Joel Rogers have argued that the popular understanding of the so called "litigation explosion" is misinformed:

[P]opular critics of the "litigation explosion" and the excesses of lawyers typically focus on product liability claims, other personal injury claims, and nuisance suits brought by individuals. Seldom do tort reformers admit that the contemporary surge in litigation, to the extent that it exists at all, contains a major component of business litigation.<sup>271</sup>

Many corporate general counsels have also taken note of this change. According to one observer, in the late 1960s and early 1970s, many corporations increased their legal staffs in response to several different events. One of them was an increase in business litigation

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269. Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L. J. 1201, 1203 (1997).

270. See Milo Geyelin, *Suits by Firms Exceed Those by Individuals*, WALL ST. J., Dec. 3, 1991, at B1.

271. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U.L. REV. 1393, 1452 n.294 (1993) (referring readers to Marc Galanter & David Luban, *A Transformation of American Business Disputing? Some Preliminary Observations* (Inst. for Legal Studies Working Paper No. DPRP 10-3, 1991), in which the authors explore a suspected increase in business-versus-business litigation).

that was due, in part, to the increase in suits by businesses (as opposed to individuals) against other businesses.<sup>272</sup>

A study by the Court Statistics Project of the National Center for State Courts examining data from seventeen states determined that, between 1993 and 2002, tort filings decreased by 5% and contract filings increased by 21%. Between 1993 and 1998, tort filings outnumbered contract filings, yet that statistic reversed after 1998 and contract cases in state courts now outnumber tort filings.<sup>273</sup>

A similar trend was found in federal district courts in a study conducted by the RAND Institute for Civil Justice. The study noted that while tort suits constituted 35.3% of the civil filings in 1971 (22,621 out of 64,016 total suits), they constituted only 24.1% of the filings by 1986 (38,896 out of 161,724 total suits). Conversely, contract and real property filings were 22.6% of the total filings in 1971 (14,444 out of 64,106 total suits); yet by 1986, they constituted 26.8% of the filings (43,394 out of 161,724 total suits).<sup>274</sup>

Why has business-to-business litigation changed so dramatically over the past thirty years? In part, such litigation is a result of important doctrinal changes in tort law sought during litigation. In addition, however, if a business can establish a tort claim, the damages awarded, including punitive damages, can be astronomical. For example:

[T]he aggregate total of all punitive damage awards in product liability cases between 1965 and 1995 is estimated at . . . \$1.3 billion over a thirty-year period. That is less than half of the \$3 billion in punitive damages a Texas jury

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272. See Liggio, *supra* note 269, at 1203.

273. The National Center for State Courts Court Statistics Project, *Examining the Work of State Courts, 2003*, [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_SubCivil-TORTCON.pdf](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SubCivil-TORTCON.pdf) (last visited Aug. 1, 2005).

274. TERENCE DUNGWORTH & NICHOLAS M. PAGE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 13, tbl.2.3 (RAND Inst. for Civil Just. 1990). Note that the utility of this data depends on the assumption, which most articles make, that the majority of contract and real property filings are filed by businesses.

awarded in a single [business] dispute between two oil companies—Pennzoil and Texaco—in November 1985.<sup>275</sup>

Moreover, the largest verdicts in 2000 included a “\$324 million verdict in a patent infringement claim, a \$233 million verdict in a securities fraud case, and a \$181 million verdict in a breach-of-contract suit.”<sup>276</sup>

In 2002, eight of the twenty highest verdicts and settlements in the United States were awarded in suits brought by businesses against other businesses.<sup>277</sup> One suit involved antitrust litigation between two hospital bed manufacturers, and while it settled for \$250 million prior to the entry of the jury verdict, the jury in the case had awarded the plaintiff \$520.77 million.<sup>278</sup> The settlement hardly indicated an attempt to reduce litigation. Rather, the judge noted that the present suit was merely “the latest in a long running series of lawsuits among several related corporations.”<sup>279</sup>

Another suit in 2002, between companies involved in the licensing and production of medical technology, resulted in a jury award of \$505 million, \$400 million of which was punitive damages.<sup>280</sup> The basis of the suit included the tort claim of unfair competition as well as a breach of the duty of good faith and of the parties’ agreement.<sup>281</sup>

These damage awards have included not only significant compensatory awards, but punitive damage awards as well. A 1996 study by the RAND Institute for Civil Justice analyzed civil jury verdicts in fifteen state court jurisdictions between 1985 and 1994. Of the 978 civil suits that had punitive damage awards, 462 of those

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275. Ronald D. Krist, *Wide View of Tort Reform*, 24 PEPP. L. REV. 889, 893 (1997).

276. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDIS. L.J. 77, 94 (2003), (quoting Gregory D. Hopp, *IT Perspective: Questionable Claims Finding Some Success in Court*, BUS. INS., June 18, 2001, at G12).

277. The National Law Journal’s Largest Verdicts of 2002, at <http://www.verdictsearch.com/news/verdicts/special/top100/nlj100-1.jsp> (last visited Aug. 1, 2005) [hereinafter NLJ Largest Verdicts 2002].

278. *Id.*

279. *Kinetic Concepts, Inc. v. Hillenbrand Indus., Inc.*, 262 F. Supp. 2d 722, 722 (W.D. Tex. 2003).

280. *See* NLJ Largest Verdicts 2002, *supra* note 277.

281. *Id.*



suits (47.2%) were business suits.<sup>282</sup> On the other hand, there were merely 43 product liability suits that awarded punitive damages, accounting for only 4.4% of the total number of punitive damage awards.<sup>283</sup> There were 19 medical malpractice suits with punitive damages (1.9%), and 80 landowner liability suits with punitive damages (8.1%).<sup>284</sup> According to one advocacy group,

Professors Michael Rustad and Thomas Koenig's on-going analysis of business tort cases—what they term “Goliath versus Goliath” cases—shows that the vast majority of hundred-million-dollar verdicts arise in business litigation. According to their findings: “Intellectual property disputes, indemnification of pollution cases, real estate development, trade secrets litigation, and general corporate bad faith cases is where large punitive damages awards are more common. Rand’s Institute of Civil Justice, the American Bar Foundation study, and [Rustad’s] summary of all punitive damages research . . . confirms that if there is any problem in punitive damages as a remedy, it is likely to be in the field of business versus business.”<sup>285</sup>

Another reason for the increase in business litigation is the now customary use of key tort doctrines whenever there is a dispute over contracts. For example, if one party to a business agreement breaches, and the other brings suit, the suit is likely to allege torts such as fraud, misrepresentation, intentional interference with contractual relations, interference with business or employment relations, unfair competition, misappropriation of trade secrets and ideas, defamation of title, constructive fraud, or negligent misrepresentation.<sup>286</sup> Indeed, if any business plaintiff’s lawyer having evidence of such behavior *failed* to allege these torts in the context of a business dispute, such failure would be evidence of

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282. ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at 55, tbl.A.9 (RAND Inst. for Civil Just. 1996).

283. *Id.*

284. *Id.* at 54–55 tbl.A.9.

285. Emily Gottlieb & Joanne Doroshow, *Not In My Backyard II: The High-Tech Hypocrites of “Tort Reform,”* at 9 (Center for Justice and Democracy, Number 6, April 2002), <http://www.centerjd.org/free/Hypocrites2.pdf>.

286. See Shigley Law Firm, LLC, *Business Torts*, at [http://atlantainjurylawyer.com/html/business\\_torts.html](http://atlantainjurylawyer.com/html/business_torts.html) (last visited Aug. 1, 2005).

lawyer malpractice in the absence of a good reason not to allege the tort. It is so common in the world of business litigation to allege one or more of these torts, that business lawyers create standardized form paragraphs, and routinely insert them into complaints.

#### IV. IMPLICATIONS FOR THE FUTURE OF TORT RETRENCHMENT

A number of implications can be drawn from the foregoing analysis. First of all, loose reference to a "litigation explosion," without addressing *why* there is increased litigation is both mindless and irresponsible. For example, it is true that in the last thirty years there has been an "explosion" of sex harassment claims filed with the Equal Employment Opportunity Commission (EEOC), from fewer than 6,000 in the 1980s to over 35,000 in the 1990s.<sup>287</sup> And what is a sex harassment claim but a statutory tort? Because of this increase in employment related litigation, insurance premiums for wrongful discharge claims (such as sex and race harassment) have also increased. Millions of hours of employer and lawyer time are spent responding to these claims. Does this mean we should abandon our commitment to gender and racial equality in the workplace? If the sole criterion is a desire to reduce the number of claims, then one might answer yes. On the other hand, if you think that the explosion in sex harassment claims is a necessary component to enforcing ideals of equality, you might argue that, if there were less discrimination, there would likely be fewer claims.

A second example: One of the trends mentioned earlier was the imposition upon retail establishments of an increased duty to protect their customers from foreseeable criminal acts while on their premises. Many people believe that this expanded duty has enhanced public safety, particularly where a retailer knows of a pattern of criminal activity on its premises and does nothing to prevent further crime. So, should the legal system have created these expanded duties owed to the public at large? Should we now retract from these duties? Liability insurance premiums have certainly increased as a result, but arguably, so has public safety on premises to which the public is invited.

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287. See EEOC, *Trends in Harassment Charges Filed with the EEOC*, at <http://www.eeoc.gov/stats/harassment.html> (last modified July 22, 2004).

A third example has to do with medical malpractice. Tort litigation creates important incentives and disincentives for social actors. In the case of medical practices that harm patients, malpractice lawsuits serve the important social purpose of encouraging careful medical practice, and deterring malpractice. Yet many studies have shown that only a fraction of medical malpractice is actually reported, and an even smaller percentage of medical malpractice cases are litigated.<sup>288</sup>

One question that must be asked, therefore, is why tort litigation has not been effective either in deterring medical malpractice or in compensating victims. According to one research report, "at most 1 in 25 negligent injuries resulted in compensation through the malpractice system"<sup>289</sup> and "only 1 in 5 incidents of malpractice gives rise to a malpractice claim."<sup>290</sup> In other words, damage caps on malpractice liability cases have discouraged socially beneficial litigation that serves to deter medical malpractice.

If the threat of tort litigation is inadequate to deter medical malpractice, then tort reformers have perhaps unwittingly opened doors to other types of regulatory efforts to control malpractice. For example, if tort reform succeeds in staunching litigation, and incidents of medical malpractice go uninvestigated and unremedied, we are likely to see increased calls for more governmental oversight of medical practice, and in other areas as well. For example, the National Academy of Sciences (NAS) recently pointed out that "preventable medical errors in hospitals exceed attributable deaths to such feared threats as motor-vehicle wrecks, breast cancer, and AIDS."<sup>291</sup> As a result, the NAS study called for the creation of a

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288. See, e.g., Troyen Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 324 NEW ENGLAND J. MED. 370 (1991). In the Brennan study of New York hospitals, the researchers concluded that 1% of all hospitalizations resulted in patient injury that resulted from medical negligence. *Id.* at 373. Of the 306 instances of medical malpractice, only eight victims actually filed malpractice lawsuits. *Id.* at 371-72.

289. DANZON, *supra* note 166, at 24.

290. *Id.* at 25.

291. NAT'L ACADEMY OF SCIENCES (NAS), *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1* (Report Brief) 1 (Nov. 1999), <http://www.iom.edu/file.asp?id=4117> (last visited Aug. 1, 2005); see also KOENIG & RUSTAD, *supra* note 64, at 80; Robert Pear, *Protect Patients from Fatal Mistakes*, U.S. Urged, PLAIN DEALER, Nov. 30, 1999, at 10A.

new federal agency to protect patients.<sup>292</sup> It would be very interesting to know whether the medical establishment would prefer a new federal agency overseeing poor medical practice, or the tort system.

In sum, increased litigation is not an evil if it protects important rights, increases overall public safety at reasonable cost, or incentivizes the development of safer practices. If you think we have “too much litigation,” should we abolish the cause of action for sex harassment? Or should we prevent fishermen from recovering their losses stemming from Unocal’s negligent dumping? Or should we not require businesses to protect their patrons from foreseeable criminal acts? Or should cigarette manufacturers have no liability for putting into the stream of commerce and promoting consumption of a product that demonstrably injures millions of people every year?

Obviously, there are gradations of argument here: one can argue that the standard for liability for each of these torts should be higher, or that recoveries should be limited. But the main point is that to participate meaningfully in any debate about changing the tort system, one must be specific about what rules of liability or damages should change, and why. Therefore, if one objects to the increase in litigation, one should be called upon to identify specifically which of the major trends in tort law should be curtailed.

A second implication we can draw is that cutting litigation claims will do nothing to address the underlying harms that are the subject of the litigation. Many advocates of changing the civil justice system seem to suggest that if we merely stopper litigation, the harms will go away. But this is naive. Barring litigation or capping damages will not prevent the harm from occurring. Indeed, the harm has occurred, and the civil justice system is merely the mechanism we have created to sort through the harms. One can complain that such litigation is administratively costly and imposes significant costs on the society, but the civil justice system is just the bearer of the bad news. Curtailing litigation will not curtail the harms that litigation serves to redress. It will merely shunt those losses into some other corner of a society ill equipped to address them.

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292. NAT’L ACADEMY OF SCIENCES, *supra* note 291, at 3.

When performing its adjudicative role, the civil justice system serves two important sorting functions. The first function separates compensable harms from harms that will not be redressed. The second function adjudicates who should pay for those harms that are compensable. We address each function in turn.

The sorting function is performed by institutional actors (judges, legislatures, and juries) who establish the rules (judges and legislatures) and then apply them to specific settings (judges and juries). Sorting results in determining that a significant percentage—most studies indicate more than half—of all cases that are filed in court will not be found to have met the standard of proof. Thus, half of all injured persons—or persons who believe they have been injured by the conduct of others—go uncompensated.

Suppose we curtail all future asbestos litigation, as advocated by some “tort reformers,” and summarily dismiss the 100,000 asbestos cases presently “clogging the courts,” as one so-called reform group put it.<sup>293</sup> If we dismiss asbestos claims from the civil justice system, we have not solved the problem that real people have suffered real injuries resulting from the operations of a complex society that creates toxic products. We also have not dealt with the reality that very responsible corporate defendants made very irresponsible decisions incorporating asbestos into thousands of homes, businesses, and schools, and exposing millions of people to the hazards of a dangerous product.<sup>294</sup>

But even putting the complex issue of responsibility aside, by summarily dismissing the asbestos cases from the civil justice system, we succeed merely in shunting the problem of how to deal with these 100,000 cases of injury resulting from asbestos to some other social venue. What will happen to the injured? Maybe our

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293. See, e.g., Institute for Legal Reform, *Issues—Asbestos*, at <http://www.legalreformnow.com/issues/asbestos.html> (last visited Aug. 1, 2005) (“Hundreds of thousands of asbestos claims are clogging state and federal courts across the country, and thousands of new claims are being filed every year.”).

294. We are very much aware that the issue of responsibility for harms resulting from asbestos is far more complex than the text would indicate. But the point is that absolving the group of asbestos defendants from further liability does not solve the problem that a few hundred thousand people continue to suffer from harms caused by asbestos.

public hospitals are wealthy enough to accommodate a huge influx of new non-paying clients. Maybe our federal government will have enough foresight to establish a new benefits program to deal with the long-term issues created by this substance. Maybe our state governments will find a way to expand health care to workers incapacitated by asbestos. Or, more likely, maybe we will just shove another critical issue of public health under the bulging carpet and hope none of those victims have enough power to make a stink.

When one sets out to reform the civil justice system, one must examine unintended consequences of those reforms on the public health system in the country. If products liability litigation is curtailed, what will happen to the victims of injuries caused by products? For example, the Chair of the Consumer Product Safety Commission testified that consumer product injuries alone *accounted for one of every six hospital days in the country*.<sup>295</sup> What are the implications for the public health systems in this country if tort retrenchment succeeds in cutting back on products liability litigation? This is an important question for any proposal to reform the civil justice system.

The second function the civil justice system serves is to determine, out of the harms determined to be compensable, *who will pay* for the harms. We can call this decision of "who should pay" a question of legal responsibility. We should now like to turn to the question of how we define "legal responsibility."

Over the last few hundred years, the question of how to define legal responsibility has occupied the minds of many jurists and scholars. Some early notions of responsibility identified the responsible agent as the live thing that caused harm.<sup>296</sup> So, if your bull gored me, we might have a trial on the question of whether the bull should be put to death.

In recent decades, however, the theory of how liability should be assessed has shifted from an effort to place blame on particular actors to a much more overarching goal of reducing overall social

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295. See U.S. CONSUMER PRODUCT SAFETY COMMISSION, REGULATORY REFORM INITIATIVE (Summary Report, CPSC Document #8005, June 1995), at <http://www.cpsc.gov/businfo/8005.html>.

296. See OLIVER WENDELL HOLMES, THE COMMON LAW 10-12 (1963 ed.).

harms. The focus has turned from personal moral blameworthiness to overall social welfare.

In objecting to expansive liability doctrines for preschools, it might be convenient to pretend that *lawsuits* attempting to hold preschools liable for damages to children molested by their teachers are responsible for increased liability insurance premiums. Or those advocating a return to immunities for charities might argue that the Catholic Church should not be held liable for shielding from discovery the pedophilia of a priest. On the other hand, children have been injured, and those injuries will not go away merely because lawsuits against preschools or churches are barred.

In sum, a loss has occurred. The important question is *who* should pay for the loss. The tort system is serving a distributional function—shifting losses from the plaintiff to the defendant. If you object to the distributional consequences, don't pretend that by barring lawsuits the losses will magically disappear.

#### V. CONCLUSION

In any system set up to adjudicate millions of injuries every year, there will be errors, misjudgments, and results that many people will find unfortunate, if not outrageous. But "argument by anecdote"<sup>297</sup> will not capture the real debate going on over the reach of the civil justice system. Our view is that the real focus of the current set of critiques is the 80 years of legal ferment that transformed civil justice during the first part of the 20th Century. However, neither the proponents of retrenchment nor the defenders of the tort system have acknowledged that the 1900-1980 changes in tort law undergird the post-1975 tort retrenchment movement. We think that public discourse would be vastly improved if this were the focus of the argument.

The tort retrenchment movement can claim many successes. It has succeeded in politicizing the system of civil justice, and brought its contentions into every state legislature in the country, as well as in Congress. The debate asks us who should pay for losses that a

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297. The movement for tort retrenchment gained a lot of traction over repeated and often inaccurate descriptions of the so-called "McDonald's coffee" case. See *Liebeck v. McDonald's Restaurants*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

complex post-industrial society creates. It is also a debate about allocating legal responsibility for loss, such as whether we should shift losses from those unlucky enough to hold winning tickets in a catastrophic lottery to those who are responsible for or at least could have prevented the loss. It also questions how we should measure those losses. At the core, these are indeed political, moral, and legal debates.



